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*Information Technology & Applications Corporation v. United States:*
An Interested Party's "Substantial Chance" at APA Standing

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The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government

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## I. INTRODUCTION

Undeniably, "standing is the key to the courthouse; [and] those who possess the key, possess the power."[1] In 1996, Congress established one, uniform federal standard for standing to sue in government procurement bid protests.[2] The Administrative Dispute Resolution Act (ADRA) gave "interested parties" standing in both the district courts and the Court of Federal Claims (COFC).[3] But the question of who qualified as an "interested party" quickly caused dissention among the COFC[4] judges and the district

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[1] PETER L. STRAUSS, TODD RAKOFF, ROY A. SCHOTLAND & CYNTHIA R. FARINA, ADMINISTRATIVE LAW 1121 (9th ed. 1995).

[2] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3869, 3874 (1996) (codified at 28 U.S.C. §1491(b)(1)). Congress' goal was to eliminate the jurisdictional differences that existed between the district courts and the Court of Federal Claims, which had led to forum shopping and inconsistent outcomes. 142 Cong. Rec. S11848-01 (1996); H.R. Conf. Rep. 104-841 (1996).

[3] 28 U.S.C. 1491(b)(1).

[4] The Court of Federal Claims began as the Court of Claims. In 1982, Congress changed the Court of Claims into the United States Claims Court. Federal Courts Improvement Act, Pub. L. No. 97-164, § 105(a), 96 Stat. 27 (1982). Then in 1992, Congress changed the court's name from the United States Claims Court to the Court of Federal Claims, which it remains today. Federal Court Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506 (1992). For the purposes of this thesis, the term Court of Federal Claims is used throughout to avoid confusion.

courts.[5]

Some COFC judges and district courts chose to define "interested party" in accordance with the Competition in Contracting Act (CICA).[6] The Competition in Contracting Act limits interested parties to "actual or prospective bidders with a direct economic interest in the award of a contract."[7] Other COFC judges adopted a more loosely defined theory of interested party standing, which often turned to the Administrative Procedure Act (APA) for guidance.[8] At the same time, a majority of district courts continued to use the same standing analysis previously formulated for use

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[5] For cases accepting CICA's narrow "actual or prospective bidder definition, *see Baltimore Gas and Electric Company, v. United States*, 290 F.3d 734, 738 (4th Cir. 2002); *Corel Corporation v. United States*, 165 F. Supp.2d 12, 22-23 (D.D.C. 2001); *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 778 (1997). For cases taking a broader view of interested party standing *see Cybertech Group, Inc., v. United States*, 48 Fed. Cl. 638, 643 (2001) (test for standing under the ADRA is the same as under the APA); *American Federation of Government Employees, AFL-CIO, v. United States*, 46 Fed. Cl. 586, 592-93 (2000) (*AFGE*) (interested party standing includes protestors who would have standing under the APA); *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90, 101-103 (2000) (treating CICA as instructive, not conclusive); *CCL, Inc., v. United States*, 39 Fed. Cl. 780, 789-90 (1997) (CICA definition is relevant, but does encompass "the four corners of potential standing" under the ADRA); *Delbert Wheeler Construction, Inc., v. United States*, 39 Fed. Cl. 239, 245 (1997) (interested party under ADRA is broader than CICA's narrow definition); *ATA Defense Industries, Inc., v. United States*, 38 Fed. Cl. 489, 494-95 (1997) (CICA definition is narrower than interested party under ADRA). For a discussion of post-ADRA but pre-sunset district court cases *see* Shestko, *Interested Parties: Time to Clear the Muddy Waters for Bid Protestors*, Unpublished Thesis on File at George Washington University (2000).

[6] *CC Distributors*, 38 Fed. Cl. at 778; *Baltimore Gas*, 290 F.3d at 738; s*ee also American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294 (2001).

[7] 31 U.S.C. § 3551(2).

[8] *Cybertech Group*, 48 Fed. Cl. at 648; *AFGE,* 46 Fed. Cl. 586, 592-93; *Phoenix Air Group,* 46 Fed. Cl. 90, 101-103; *CCL, Inc.*, 39 Fed. Cl. at 789-90.

under the APA.[9] This disparity served to judicially undermined Congress' legislative attempt at bid protest homogeneity.

Although Congress' drive for uniformity initially failed, the sunset provision of the ADRA divested the district courts of their bid protest jurisdiction on January 1, 2001.[10] Standing to sue based on a bid protest now only exists in the Court of Federal Claims.[11] In 2001, the United States Court of Appeals for the Federal Circuit (Federal Circuit) handed down the definitive definition of interested party. It resolved the interested party debate in favor of the CICA.[12]

But the memory of district court standing under *Scanwell v. Shaffer*[13] and its progeny still haunts the government legal contract community. There exists a pervasive belief that defining an ADRA "interested party" in accordance with the CICA creates a

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[9] Shestko, *supra* note 5 at 31-45. *But see Baltimore Gas*, 290 F.3d at 738 (interested parties under the ADRA are limited to actual or prospective bidders with a direct economic interest in the award of a contract); *Corel Corporation v. United States*, 165 F. Supp.2d 1 at 22-23 (using CICA definition to determine if plaintiff was an interested party under the ADRA).

[10] Pub. L. No. 104-320, § 12(d), 10 Stat. 3870, 3874 (1996) (previously codified at 28 U.S.C. § 1491(d)).

[11] Id.; s*ee Emery Worldwide Airline, Inc., v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001) ("Court of Federal Claims is the only judicial forum to bring any governmental contract procurement protest");*City of Albuquerque V. United States Department of Interior*, 217 F. Supp. 2d 1194 (D.N.M. 2002) (On January 1, 2001, the COFC gained exclusive jurisdiction over bid protests); *Novell v. United* States, (109 F. Supp. 2d 22 (D.D.C. 2000) (COFC has exclusive jurisdiction over bid protests on January 1, 2001).

[12] *American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (standing under the ADRA is "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or failure to award the contract").

[13] *Scanwell Laboratories, Inc., v. Shaffer*, 424 F.2d 859 (D.C. Cir 1970) (holding that disappointed bidders had standing to bring a bid protest under the APA).

narrower concept of standing than that which would be available under the APA.[14] If only the court had sensibly chosen the APA standard, a broader, more meaningful class of plaintiffs would have the power to open the courthouse doors.[15]

This paper asserts that Federal Circuit's decision in *Information Technology & Applications Corporation v. United States*[16] has transformed CICA's "interested party" definition into the functional equivalent of the current law governing APA standing.[17] Building on CICA's "interested party" definition with *Information Technology's* refinement of "substantial chance" rule, the Federal Circuit has effectively translated "APA standing" into the language of government contracts.[18]

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[14] Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155 (1997); Fredrick W. Claybrook, Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions--Learning Lessons All Over Again*, 29 PUB. CONT. L.J. 1 (1999); Jennifer Gartner, *The Meaning of "Interested Party" Under 28 U.S.C. § 1491*, 20 PUB. CONT.L.J. 739 (2000); Shestko, *supra* note 5.

[15] Cantor, *supra* note 14; Claybrook, *supra* note 14; Gartner, *supra* note 14; Shestko, *supra* note 5.

[16] *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312 (Fed. Cir. 2003).

[17] Administrative Procedure Act standing refers to the test enunciated by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and *Bennett v. Spear*, 520 U.S. 154 (1997) and *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) (*First National Bank*). It is comprised of two components, "constitutional" and "prudential." Constitutional standing requires injury in fact, causation, and redressability. *Lujan*, 504 U.S. 560; *Friends of the Earth Incorporated v. Laidlaw Environmental Service (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Once those three elements are met, prudential standing requires that the plaintiff's grievance must be within the "zone of interests protected or regulated by the statutory provisions of constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. at 162, *First National Bank*, 522 U.S. at 488.

[18] *See Information Technology*, 316 F.3d at 1319.

The purpose of this paper is not to prove with mathematical certainty that the standing result would be identical whether a court applied the Federal Circuit's "interested party" standard or the APA two-prong test. Just as reasonable people will differ, reasonable Justices do differ, especially when it comes to the thorny matter of standing.[19] Instead, the purpose is to illustrate that interested party standing determinations based on the substantial chance rule are actually consistent with highly probable standing outcomes under the APA.

In order to understand the current tension between interested party standing and APA standing, a review of the history of bid protest jurisdiction is necessary. Although the ADRA's sunset provision eliminated district court jurisdiction over bid protests, the current status of standing in the COFC cannot be divorced from the evolution of standing in the district courts.[20] Current bid protest standing under ADRA evolved as much from district court standing doctrine as it did from standing in the COFC.[21] Moreover, it is the expansive language of the pre- *Lujan* district court cases, especially *Scanwell,* which

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[19] *See Friends of the Earth*, 528 U.S. 167 (2000) (Justices Stevens and Kennedy concurring separately, Justices Scalia and Thomas dissenting); *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) (Justices O'Connor, Stevens, Souter, and Breyer dissenting); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (Justices O'Connor and Kennedy concurring, Justice Breyer concurring separately, Justices Stevens, Souter, and Ginsburg concurring separately); *Lujan*, 504 U.S. 555 (1991) (Justices Kennedy and Souter concurring in the same opinion, Justice Stevens concurring separately, and Justices Blackmun and O'Connor dissenting). *But see Bennett v. Spear*, 520 U.S. 154 (1997) (unanimous decision).

[20] Claybrook, supra note 14, at 3.

[21] *Id.*; *see American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294 (2001).

creates the perception that broader access to the courts would exist under the APA concept of standing.[22]

Accordingly, **Part II** of this thesis reviews the history of bid protest standing prior to the ADRA. **Section A** explains the "legal rights" theory behind *Perkins v. Lukens Steel Co.'s* holding that disappointed bidders had no standing to sue.[23] **Section B** traces the post-*Perkins* evolution of bid protest standing in the district courts culminating with the landmark decision of *Scanwell Laboratories, Inc. v. Shaffer,* which gave disappointed bidders standing to sue under the APA.[24] **Section C** shifts to the development of bid protest standing in the Court of Federal Claims from "implied contract" standing to the Federal Courts Improvement Act,[25] the effects of which served as one impetus for enacting the ADRA. Finally, **Section D** identifies the lingering ill effects of the "substantial chance" rule. While the Federal Circuit's inclusion of prejudice in standing rather than review of the merits makes it more difficult to succumb to the temptation of discounting procedural errors via "no prejudice," the opportunity does still exists.

**Part III** begins with the ADRA and chronicles the evolution of interested party standing in the COFC. **Section A** explores the Federal Circuit's rejection of APA standing in order to define "interested party" in accordance with CICA. **Section B** reviews Federal Circuit's adoption of the "substantial chance" rule. **Section C** discusses *Information Technology & Applications Corporation v. United States*, which represents

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[22] Cantor, *supra* note 14; Claybrook, *supra* note 14; Gartner, *supra* note 14; Shestko, *supra* note 5.

[23] *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

[24] *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (1970).

[25] Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164; 96 Stat. 25 (1982).

the final evolutionary step in the Federal Circuit's development of the substantial chance rule.[26]

**Part IV** analyzes interested party standing as compared to the current law governing APA standing. It then argues that the answer to the questions of whether a protestors has is the same regardless of whether the court applies "interested party" standing or APA standing. It is believed this analysis will establish that the Federal Circuit's interpretation of "interested party" embraces all the elements of APA standing, resulting in a functionally equivalent test that balances the need of the government to procure goods in an efficient and timely manner with the goal of ensuring fair procurements through transparency.

## II. BID PROTEST STANDING PRIOR TO THE ADMINISTRATIVE DISPUTES RESOLUTION ACT

### A. *Perkins v. Lukens Steel Co.*[27] - A Bid Protestor's Legal Rights Lead to No Standing

The evolution of standing into a distinct legal doctrine began during the first half of the twentieth century.[28] The first enunciated test for standing was the "legal rights" doctrine.[29] This doctrine, which focused solely on the legal rights of each specific,

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[26] *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003).

[27] *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

[28] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224 (1988).

[29] Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 255, 261-272 (1961); s*ee Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923); *Edward Hines Yellow Pine Trustees v United States*, 263 U.S. 143, 148 (1923).

individual plaintiff, had its genesis was the companion cases of *Frothingham v. Mellon* and *Massachusetts v. Mellon*.[30]

In *Frothingham*, two taxpayers alleged that a statute apportioning federal money among the states "to reduce maternal and infant mortality and protect the health of mothers and infants" was illegal and unconstitutional.[31] The Supreme Court did not reach that ultimate issue, but dismissed the suit due to lack of standing. In reaching that conclusion, the Supreme Court articulated what ultimately became the foundation of the legal rights doctrine: in order to invoke the power of the federal courts, plaintiffs must show that not only is the statute invalid, but that its enforcement caused a direct legal injury to the plaintiff as opposed to some indefinite harm suffered "in common with people generally."[32] Thus, a plaintiff had to show that a particular legal right of his own was violated in order to establish standing.[33]

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[30] *Frothingham*, 262 U.S. at 488; *see* Gartner, *supra* note 14, at 740; Jaffe, supra note 29, at 261-272;

[31] *Frothingham*, 262 U.S. at 479.

[32] *Frothingham*, 262 U.S. at 488. The Supreme Court determined that a federal taxpayer's interests in the treasury's money were "minute and indeterminable" as compared to all other taxpayers, and the effect of treasury expenditures on future taxation was too "remote, fluctuating, and uncertain." *Id.* at 487. Thus, the Supreme Court relied on what later developed into the Article III requirements of injury in fact and redressability in denying standing. James Leonard & Joane C. Brant, *The Half-Open Door: Article II, The Injury-In-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 10 (2001).

[33] *Frothingham*, 262 U.S. at 488. Later that same year, in *Edward Hines Yellow Pine Trustees v. United States*, the Supreme Court re-affirmed *Frothingham's* test for standing. *Edward Hines Yellow Pine Trustees v United States*, 263 U.S. 143 (1923). The court stated that it was not enough for the plaintiffs to show that the Interstate Commerce Commission (ICC) did not have the legal authority to act. *Id.* at 148. "They must also show that that the [ICC's allegedly illegal action] subject[ed] them to legal injury, actual or threatened." *Id.*

The following year, the Supreme Court revisited the fledgling doctrine in *The Chicago Junction Case*.[34] In *The Chicago Junction Case*, the Interstate Commerce Commission (ICC) granted the New York Central Railroad Company the exclusive right to use the railroad terminal located within the Chicago switching district.[35] Previously, twenty-three different railroad companies used the Chicago terminal railways.[36] After the ICC's exclusive grant to New York Central, six of the twenty-two excluded companies contested the legality of the ICC's decision.[37] In response, the ICC argued that the six competitors did not have the requisite legal interest required to challenge the ICC's order.[38]

In holding the plaintiffs did have standing, the Supreme Court expanded the "legal rights" doctrine to include standing based "on a determination that an interest

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[34] *The Chicago Junction Case*, 264 U.S. 258 (1924); *see* Jaffe, *supra* note 29, at 262-3.

[35] *Id.*, at 259.

[36] *Id.*

[37] *Id.* The Supreme Court found that the ICC's unequal treatment caused the plaintiff's injury. *Id.* at 267.

[38] *The Chicago Junction Case*, 264 U.S. at 259. The dissent agreed, arguing that "the injuries alleged to have been sustained . . . are not such as to afford the basis for a legal remedy . . . A private injury, for which the law offers no remedy, cannot be converted into a remediable injury, merely because its results from an act of which the public might complain." *Id.* at 271-73.

intended by statute to be protected has been denied that protection."[39] The Court relied on the purpose of the statute which authorized the ICC to grant a company exclusive control over a terminal.[40] The statute in question mandated the joint use of terminals and prohibited the acquisition of a terminal by a single carrier, unless authorized by the ICC.[41] By legislating such a preference for joint terminal usage, Congress thereby created a "legally protected interest" in open terminals that provided standing for those companies denied access by an ICC order.[42]

The language of *Tennessee Elec. Power Co. v. TVA* provides perhaps the most complete expression of the mature legal rights doctrine.[43] A plaintiff "threatened with

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[39] *The Chicago Junction Case*, 264 U.S. at 266-8. (Congress had "recognized a certain 'interest' as one which must be heeded, [and] it is such a 'legally protected interest' as warrants standing to complain of its disregard"). This language seems to foreshadow the Supreme Court's articulation of the "zone of interests" test. *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150, 830 (1970)(standing requires that "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question"); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) ("the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint"); *National Credit Union Administration v. First National Bank and Trust Co.*, 522 U.S. 479, 490 (1998) (citing the same language of *Data Processing* and *Bennett v. Spear*).

[40] *The Chicago Junction Case*, 264 U.S. at 266-8; *see* Jaffe, *supra* note 29, at 263; Kenneth E. Scott, *Standing in the Supreme Court--A Functional Analysis*, 86 HARV. L. REV. 645, 655 (1973). The Chicago Junction Case is distinctive because the legal rights doctrine usually denied standing. Gartner, *supra* note 14, at 741.

[41] *The Chicago Junction Case*, 264 U.S. at 267.

[42] *The Chicago Junction Case*, 264 U.S. at 266-8; *see* Jaffe, *supra* note 29, at 262-4; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1725 (1975).

[43] *Tennessee Elec. Power Co*, 306 U.S. at 118, 137 (1939); *see* Gartner, *supra* note 14, at 471; Jaffe, *supra* note 29, at 265; Leonard, *supra* note 32, at 9.

direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent.[44] A colorable legal right is "one of property, one arising out of contract, one protected against tortuous invasion, or one founded on a statute which confers a privilege."[45] It was this articulation of the "legal rights" doctrine that was embraced in *Perkins v. Lukens Steel Co* to deny standing to a disappointed bidder.[46]

In *Perkins*, seven producers of iron and steel, who were potential bidders on future government contracts, asserted standing based on an alleged violation of Public Contracts Act.[47] The Public Contracts Act required contractors to agree to pay employees the prevailing minimum wages for the contractor's locality as determined by the Secretary of Labor.[48] Lukens Steel asserted the Secretary of Labor misconstrued what constituted a proper locality, which allegedly caused Lukens Steel economic harm, and, thus provided standing to sue.[49]

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[44] *Tennessee Elec. Power Co*, 306 U.S. at 137 [citing *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)].

[45] *Tennessee Elec. Power Co*, 306 U.S. at 137.

[46] *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *see* Romualdo P. Eclavea, *Standing of Unsuccessful Bidder for Federal Procurement Contract to Seek Judicial Review of Award*, 23 A.L.R. Fed. 301, 307 (1975); Phillip M. Kannan, *Perkins v. Lukens Steel Company: Fifty-Two and Counting*, 22 PUB. CONT. L.J. 463, 466-67 (1993) (hereinafter *Fifty-Two and Counting*).

[47] *Perkins*, 310 U.S. at 116-117.

[48] *Id.*

[49] *Id.* at 115-16.

In determining that no standing existed, the Supreme Court in *Perkins* followed the same legal analysis used in *The Chicago Junction Case* and focused on whether the underlying statute created a legally protected interest or legal right.[50] In examining the Public Contracts Act, the Supreme Court ruled that procurement statutes were merely "guideposts" to be followed by government employees when purchasing supplies.[51] They existed for the benefit of the Government alone and, thus, did not bestow litigable rights.[52] Accordingly, a violation of a procurement statute did not provide prospective bidders standing to sue.[53]

The Court also considered whether enforcement of the "the public's interest in the Secretary's compliance with the [Public Contracts] Act" created a legal right.[54] In

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[50] *Id.* at 127-129. *Perkins* reiterated that, absent Congressional intent, the judicial branch should not create a new right of action. Eclavea, *supra* note 43, at 307.

[51] *Perkins*, 310 U.S. at 127. The court explained that, "like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting though its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. *Id.*

[52] *Perkins*, 310 U.S. at 127-129. Procurement statutes do no more than instruct the Government's agents "to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of this principle. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. [Thus,] the Secretary's responsibility is to superior executive and legislative authority, [not a prospective contractor]." *Id.* at 129.

[53] *Perkins*, 310 U.S. at 113. Likewise, the Court dismissed the plaintiff's argument that "public advertising before award" requirement of Section 3709 of the Revised Statutes conferred an enforceable right. Like the Public Contracts Act, the Revised Statutes benefited and protected the government, not prospective bidders. *Id.* at 126.

finding it did not, the Supreme Court explained that plaintiffs cannot "vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process."[55] Thus, the public had no general legal right to enforce government compliance with enacted statutes.[56]

### B. The Genesis of Bid Protest Standing in the District Courts: *Scanwell Laboratories, Inc. v Shaffer*[57]

#### 1. "Person Aggrieved" and Private Attorney General Doctrines

Until 1970, *Perkins* continued to stand for the proposition that government contractors had no standing to bring bid protests in district courts.[58] At the same time bid

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[54] *Perkins*, 310 U.S. at 127. *See also Fifty-Two and Counting*, *supra* note 43, at 465.

[55] *Perkins*, 310 U.S. at 125.

[56] Perkins, 310 U.S. at 125; *Fifty-Two and Counting*, *supra* note 43, at 466. In *Lujan v. Defenders of Wildlife*, the seminal case on Article III standing, the Supreme Court even more explicitly stated that the general public's interest in having government agency's comply with statutes and regulation is not enough to confer injury in fact. *Lujan v. Defender's of Wildlife*, 504 U.S. 55, 573-74 (1991). For a discussion of *Perkins* within the context of post-*Lujan* APA standing *see Fifty-Two and Counting*, *supra* note 43, at 472-75.

[57] *Scanwell*, 424 F.2d 859 (1970).

[58] American Bar Association, Section of Public Contract Law, *Comment Regarding U.S. General Accounting Office Study of Concurrent Protest Jurisdiction* (December 29, 2000), http://www.abanet.org/contract/federal/bidpro/scanwell/pdf (hereinafter ABA *Comment*); JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1560 (3d ed. 1998); Eclavea, *supra* note 43, at 308; Gary L. Hopkins, *The Universe of Remedies for Unsuccessful Offerors on Federal Contracts*, 15 PUB. CONT. L.J. 365, 367 & 423 (1985); Phillip M. Kannan, *Jurisdiction of District Courts in Cases Involving Government Contracts*, 21 PUB. CONT. L.J. 416, 421 (1992) (The holding of *Perkins v. Lukens Steel* "dominated the jurisprudence regarding issues involved in government contract formation for thirty years. It did so not by compelling logic or by persuasive arguments. Rather, the tone of the language used by Justice Black, the clarity and simplicity of the rule itself, and the authority of the Court appeared to settle the issue"). *See also Scanwell*, 424 F.2d at 378-79. For a discussion of the Supreme Court's

protests remained firmly entrenched in the legal rights era, the federal courts were otherwise expanding access to the courts.[59] This expansion began with the Supreme Court's decision in *FCC v. Sanders Bros. Radio Station*.[60]

In *FCC v. Sanders Bros. Radio Station,* the Federal Communications Commission (FCC) granted the Telegraph Herald permission to operate a radio station in the same broadcasting area as the plaintiff's station.[61] The plaintiff, Sanders Brothers, asserted standing based on insufficient advertising revenues and radio personnel to support a second station.[62] Due to that lack, the competition of the Telegraph Herald would cause Sanders Brothers severe financial harm.[63] Standing allegedly existed based on that economic harm.[64]

Although the Supreme Court ultimately found standing to sue, it did so after ruling that the Communications Act of 1934 created no legally protected interest to the

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continued reliance on *Perkins v. Lukens Steel* since 1968, *see Fifty-Two and Counting*, *supra* note 43, at 467-72.

[59] Jaffe, *supra* note 29, at 272; Leonard, *supra* note 32, at 14-17; Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 182 (1992).

[60] *FCC v. Sanders Bros. Radio Station*. 309 U.S. 470 (1940); *see* Gartner, *supra* note 14 at 742; Scott, *supra* note 37, at 656; Jaffe, *supra* note 29, at 272; Stewart, *supra* note 39, at 1730-31.

[61] *Sanders Bros.*, 309 U.S. at 471.

[62] *Sanders Bros.*, 309 U.S. at 471. Of the advertiser revenue claimed by the Telegraph Herald, half had previously used the Sander Brothers station. *Id.*

[63] *Sanders Bros.*, 309 U.S. at 471. In fact, before the Telegraph Herald was granted a license, the Sanders Brothers' operated at a loss each year. *Id.*

[64] *Id.*, at 472.

lack of competition.[65] Likewise, the statute's purpose did not include protecting radio owners from the financial harm caused by competition.[66] On the contrary, the Communications Act clearly embraced the principle of free competition.[67] Thus, Sanders Brothers had no "legal right" to sue and failed the "legal rights" test for standing.[68]

Instead, the Supreme Court found Sanders Brothers had standing to sue based on its status as a "person aggrieved" as a result of FCC's action.[69] In reaching that conclusion, the Supreme Court first determined that one purpose of the FCC statute was protecting the public's interest.[70] That purpose, combined with the statute's "person aggrieved" provision, formed the foundation for Sanders Brothers' standing to sue.[71] The Court concluded that those financially injured, like Sanders Brothers, "would [likely] be the only person[s] having a sufficient interest" to appeal an illegal FCC action and Congress could legislatively confer standing in such cases.[72] Thus, the *Sanders Bros.*

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[65] *Sanders Bros.*, 309 U.S. at 473-75. S*ee* Jaffe, *supra* note 29, at 272-73; Scott, *supra* note 37, at 656; Stewart, *supra* note 39, at 1730-31.

[66] *Sanders Bros.*, 309 U.S. at 473-75.

[67] *Id.*

[68] *Sanders Bros.*, 309 U.S. at 473-75. S*ee* Jaffe, *supra* note 29, at 272-73; Scott, *supra* note 37, at 656; Stewart, *supra* note 39, at 1730-31.

[69] *Sanders Bros.*, 309 U.S. at 476-77. Section 402(b) of the Communications Act provided for an appeal the D.C. Circuit "by any other person aggrieved or whose interests [were] adversely affected by any decision of the Commission granting or refusing any such application. *Id.* (citing 47 U.S.C.A. § 402(b).

[70] *Sanders Bros.*, 309 U.S. at 475.

[71] *Sanders Bros.*, 309 U.S. at 472, 475 (a person aggrieved is one "whose interests were adversely affected").

[72] *Id.,* at 477. *See* Scott, *supra* note 37, at 656.

holding trumped legal rights standing when the relevant statute contained a "person aggrieved" provision.[73]

Two years later the Supreme Court in *Scripps-Howard Radio, Inc. v. FCC* confirmed that premise, stating: "these [injured] private litigants have standing only as representatives of the public interest."[74] That language was quickly used to equate an "aggrieved person" with a "private Attorney General."[75] In *Associated Industries of New York State v. Ickes,* the United States Court of Appeals for the Second Circuit stated:

> We believe that the usual 'standing to sue' [i.e. legal rights] cases can be reconciled with the *Sanders* and *Scripps-Howard* cases, as follows: While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there

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[73] *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150, 153 (1970) (citing *Sanders Brother*s and *Associated Industries*, the Supreme Court found that standing can be based "on an explicit provision in a regulatory statute . . . and is commonly referred to in terms of allowing suits by 'private attorneys generals'"); Jaffe, *supra* note 29, at 273; Scott, *supra* note 37, at 6567; Sunstein, *supra* note 56, at 182 (1992).

[74] *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). See also Scott, *supra* note 37, at 657 (With the Supreme Court's decision in *Scripps-Howard* the "controversial question became not how high to set the[standing] requirements but how low").

[75] *Associated Industries of New York State v. Ickes*, 134 F.2d 694 (2d Cir. 1943). *See Data Processing*, 397 U.S. at 153 (an explicit statutory provision allowing persons aggrieved to sue "is commonly referred to in terms of allowing suits by 'private attorneys generals'"); Sunstein 56, *supra* note , at 182.

> is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.[76]

Despite that unrestrained pronouncement, the court did concede that not everyone could meet the definition of a "person aggrieved."[77] However, the court declined to elucidate the limitation, but simply noted that the Supreme Court had previously found that financial harm due to increased competition made a person aggrieved.[78]

### 2. The Administrative Procedure Act

As the law of standing continued to evolve, the broadening trend found purchase in the Administrative Procedure Act (APA).[79] The Administrative Procedure Act creates standing for violations of laws that do not expressly provide for judicial review in their statutory language.[80] When such "special statutory review" does not exist, 5 U.S.C. §

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[76] *Associated Industries*, 134 F.2d at 704. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) adopted the Second Circuit's analysis in *National Coal Ass'n v. Federal Power Commission*, 191 F.2d 462, 464-65 (D.C. Cir. 1951). *See also* Sunstein, *supra* note 56, at 182.

[77] *Associated Industries*, 134 F.2d at 705.

[78] *Id.*, at 705-706.

[79] Administrative Procedure Act § 10, 5 U.S.C. §§ 551-706 (Supp. IV 1965-68); *see Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150, 154-55 (1970) (the Court observed that "where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action [and] [t]he whole drive for enlarging the category of aggrieved persons is symptomatic of that trend"); *Scanwell Laboratories, Inc., v. Shaffer*, 424 F.2d 859, 865-67 (D.C. Cir. 1970); Scott, *supra* note 37, at 660-663; Stewart, *supra* note 39, at 1731.

[80] 5 U.S.C. § 702; 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by the statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction."). When a statutory review provision exists, it preempts all other available forms of judicial review except those not covered by its terms. STRAUSS, *supra* note 1, at 1108-1109 (*citing Thunder Basin Coal Co. v. Reich*,

702 entitles "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to judicial review in the district courts.[81]

Early APA cases focused on the "legal wrong" portion of Section 702 in order to limit litigants to the narrow "legal rights" concept of standing.[82] As the courts enlarged special statutory standing, inquiry shifted to Section 702's "person . . . aggrieved" language in order to invoke jurisdiction similar to that available under the "person aggrieved" doctrine.[83] It was that shift to the "person . . . aggrieved" language that finally provided disappointed bidders their day in district court.[84] In 1970, thirty years after *Perkins v. Lukens Steel Co.*, the United States Court of Appeals for the District of Columbia held that Section 702 provided standing to a disappointed bidder.[85]

*Scanwell Laboratories, Inc., v. Shaffer* involved a Federal Aviation Administration solicitation containing responsiveness criteria that limited acceptable bidders to only those contractors who already had instrument landing systems of the kind

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510 U.S. 200, 208 (1994; *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 422 (1965)); *see Bennett v. Spear*, 520 U.S. at 175-76.

[81] 5 U.S.C. § 702.

[82] *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *see* Jaffe, *supra* note 29, at 272-73.

[83] *Data Processing*, 397 U.S. at 154-55; *Scanwell*, 424 F.2d at 865-67; *see* Eclavea, *supra* note 43, at 308; William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADM. L.J. AM. U. 461, 472 (1995); Scott, *supra* note 37, at 660; Stewart, *supra* note 39, at 1731; Sunstein, *supra* note 56, at 182.

[84] *Scanwell Laboratories*, 424 F.2d at 859-879.

[85] *Id.*, at 860.

to be procured "installed and tested in at least one location."[86] The contract awardee did not have such a system.[87] Consequently, the second lowest bidder, Scanwell Laboratories, filed suit in District Court under the APA.[88]

Due to the holding of *Perkins v. Lukens Steel Co.*, presumably still in force, the crucial question before the court was whether 5 U.S.C. § 702 gave Scanwell Laboratories standing to seek review of a contract allegedly awarded in violation of the applicable

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[86] *Id.* The responsiveness criteria mandated that "to be responsive to this request, the contractor shall submit evidence that an identical equipement complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category 1 performance as certified by an FAA flight check . . . This shall be evidenced by the submission of a certification from the flight inspection source." *Id.*

[87] *Id.*

[88] *Id.* The plaintiff proceeded under 41 C.F.R. § 1-2.404-2 (a) which states that "any bid which fails to conform to the essential requirements of the [solicitation], such as specifications, delivery schedule or permissible alternatives thereto, shall be rejected as non-responsive." *Id.* at 861.

procurement regulations.[89] In reaching its decision, the court first weighed whether the "legal rights" doctrine retained vitality, but ultimately determined it had been supplanted by the "person aggrieved" principle.[90] The court then adopted the private attorney general theory, declaring that although "the public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity . . . the suit itself is brought in the public interest by one acting essentially as a private attorney general."[91]

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[89] *Scanwell Laboratories*, 424 F.2d at 860. The court found that *Perkins v. Lukens Steel* had been legislatively reversed. *Scanwell*, 424 F.2d at 867. Notwithstanding that finding, the Supreme Court continues to cite to *Perkins v. Luken Steel*. *Fifty-two and Counting*, *supra* note 43, at 471. Why has Perkins retained vitality for the Supreme Court? It is not because of its articulation of the legal rights doctrine of standing. *Id.* at 472. Rather, "one must keep in mind three facts involved in the case that are essential, although often ignored: (1) the plaintiffs' attempted to assert rights of the entire steel industry, not a disappointed bidder; (2) the prayer for relief included a request for injunctive relief against all government agencies, not a particular procuring agency; and (3) the injunction sought in the prayer for relief was to include all steel procurements, not one particular procurement. . . . There was general dissatisfaction rather than individual injury. . . . To the extent that Lukens Steel stands for the proposition that one who is merely seeking to litigate government policy that affects the individual in the same way as the general population has no standing to challenge the government's decision, it represents the law today [under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991)]). *Id.* Ironically, *Scanwell* has only been cited once by the Supreme Court, in a concurring opinion by Justices Brennan and Marshall. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 66 n.13 (1976). It was used to illustrate the lower courts "intellectual confusion" resulting from the Supreme Court's decisions on standing. *Id*; s*ee Fifty-Two and Counting*, *supra* note 43, at 467.

[90] *Scanwell,* 424 F.2d at 862-66. The D.C. District Court found that the Supreme Court adopted "person aggrieved" principle in order meet the need for broader standing criterion than that available under the legal rights test. *Id.*

[91] *Scanwell*, 424 F.2d at 864. The court acknowledged that the APA's "generous review provisions must be given a hospitable interpretation." *Id.,* at 866. Aggrieved persons could "invoke not only the letter of the Administrative Procedure Act and its 'generous' review provisions, but a broad conception that Congress is 'hospitable' to the maintenance of complaints against officials charged with disregarding its substantive mandate." *Id.,* at 869 (citing *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (en banc).

Consequently, "one who makes a prima facie showing alleging [a decision based on an arbitrary or capricious abuse of discretion] on the part of an agency or contracting officer has standing to sue under [5 U.S.C. § 702]."[92]

But did the D.C. Circuit really intend to allow anyone, no matter how remotely connected to a procurement, to act as a private attorney general? The question should be answered in the negative. First, the court only allowed that a plaintiff injured by illegal activity could act as a private attorney general.[93] Second, the court emphasized that implicit in *Associated Industries of New York State v. Ickes*' boundless interpretation of the private attorney doctrine was an element of injury.[94] Thus, empowerment as a private attorney general was predicated on a plaintiff's injury in fact.[95]

Moreover, the decision's "palpable injury" section demonstrates that the D.C. Circuit understood standing to include an element of injury or harm. In that discussion, the *Scanwell* court espoused a line of Supreme Court cases in which standing was found

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[92] *Scanwell*, 424 F.2d at 868.

[93] *Id.*, at 864.

[94] *Id.* Specifically, the court stated that "one of the things implicit in Judge Frank's statement strikes us as being of the utmost importance: When Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby *those who are injured* by the arbitrary and capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will have the incentive to bring suit against illegal government action and they are precisely the plaintiffs to insure a genuine adversary case or controversy. As the Supreme Court has recently said, the need is for parties with 'such a personal stake in the outcome of the controversy as to assure the presentation of issues upon which the court so largely depends for the illumination' of complex legal issues. *Id.* (citing *Baker v. Car*, 369 U.S. 186, 204 (1962)).

[95] *Scanwell*, 424 F.2d at 864, 868.

for constitutional violations based solely on a "palpable injury."[96] In conclusion, the court stated:

> It seems clear to us that . . . a person *injured* by governmental activity which goes to non-constitutional areas of his well being is just as interested in judicial review of that activity as one whose constitutional rights are being trammeled, and we perceive no logical reason for denying standing to one whose rights in the latter area are denied while granting standing to one who challenges activity which infringes rights in the former area. Thus, in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved, [i.e. injured,] seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case. . .[Moreover,] responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded. The court should have discretion to grant standing, provided the other criteria listed above are properly met.[97]

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[96] *Id.*, at 870-72 (emphasis added). The "palpable injury" cases discussed included *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *City of Chicago v. Atchison, Topeka & Santa Fe. R. Co.*, 357 U.S. 77 (1958). *Id.*

[97] *Scanwell*, 424 F.2d at 872.

Accordingly, injury if fact was intended to be a prerequisite for *Scanwell* standing.[98]

*Scanwell's* approach to APA standing served to lift the once insurmountable bar against bid protests in the district courts. Disappointed bidders now had access to the

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[98] *Id.* This more conservative reading of *Scanwell* was confirmed by the Supreme Court case of *Association of Data Processing Service Organizations, Inc. v. Camp,* decided only one month later. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *see also Barlow v. Collins*, 397 U.S. 159 (1970); *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Data Processing*, the Supreme Court articulated the first formal test for APA standing comprised of "injury in fact" and a "zone of interests." *Data Processing*, 397 U.S. at 151-55. Because Article III of the Constitution restricts judicial review to "cases" and "controversies," a plaintiff must show "that the challenged action caused him injury in fact, economic or otherwise" in order to meet Article III's "cases" and "controversies" requirement. *Id.,* at 151-52. Since injury in fact is a constitutional requirement, it applies to all federal lawsuits, not merely those brought under the APA. *Id.; see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Bennett v. Spear*, 520 U.S. 154, 161 (1997). Prong two of the *Data Processing* test is APA-specific. If the plaintiff can establish injury in fact, then the court must then decide whether he is within the protected "zone of interests." *Data Processing*, 397 U.S. at 153. 5 U.S.C. § 702 requires that the plaintiff be "aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 706. The Supreme Court interpreted that language to mean that for standing to exist under the APA, the interest which the plaintiff seeks to protect must be within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153.

district courts and used it.[99]

### C. Court of Federal Claims

#### 1. Implied Contract Theory Provides Standing

In the Court of Federal Claims (COFC), bid protestors did not have to wait quite as long to secure standing to sue. In 1956, *Heyer Products Company v. United States* granted disappointed bidders standing to sue under an implied contract theory.[100] At that time, the COFC's jurisdiction over bid protests was based on the Tucker Act, 28 U.S.C. § 1491(a)(1).[101] The Tucker Act conferred jurisdiction over claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or

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[99] The following year, the D.C. Circuit expressed concern over the D.C. District Court's "misunderstanding" and "misapplication" of *Scanwell. M. Steinthal & Co., v. Seamans*, 455 F.2d 1289, 1300 (D.C. Cir. 1971). The D.C. Circuit emphasized "the judicial responsibility to consider carefully and attentively the peculiar circumstances of each case, with a view towards *limiting the instances of unnecessary judicial intervention into the procurement process*." *Id.* (emphasis added). It then highlighted two "interrelated principles" of "especial importance." *Id.*, at 1301. First, courts should not substitute their judgment for that of the contracting officer. "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." *Id.* Therefore, courts should not overturn contract awards unless "there was no rational basis for the agency's decision." *Id.* Moreover, even when no rational basis exists, "there is room for sound judicial discretion . . . to refuse to entertain declaratory or injunctive action in a pre-procurement context." *Id.* "It would be intolerable for any frustrated bidder to render uncertain for a prolonged period of time government contracts which are vital to functions performed by the sovereign." *Id.*, at 1303. For an argument that these two principles drove pre-award suits to the General Accounting Office, see Hopkins, *supra* note 55, at 369. For a detailed discussion of post-*Scanwell* district and appellate court decisions see Claybrook, *supra* note 14, at 5; Eclavea, *supra* note 43, at 301 (1975); Kannan, *supra* note 55, at 425.

[100] *Heyer Products Company v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956).

[101] CIBINIC, *supra* note 55 at 1536; Gregg A. Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB. CONT. L.J. 325, 326 (1985); Hopkins, *supra* note 55, at 423.

upon any express or implied contract with the United States."[102] Relying on the Tucker Act's "implied contract" jurisdiction, the court held that an implied condition of a solicitation was a promise "to give fair and impartial consideration to any bid submitted."[103] In submitting a bid, the contractor accepted that implied condition, thus creating an implied contract.[104] Failure by the government to give "fair and impartial consideration" to a contractor's bid was, therefore, a breach of that implied contract.[105] Consequently, the COFC had jurisdiction to hear suits brought by disappointed bidders.[106]

Unfortunately for bidders, the COFC's ability to grant relief was limited.[107] The court could not grant declaratory or injunction relief because its jurisdiction was restricted to "money damages."[108] As a result, protestors could only recover bid and

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[102] 28 U.S.C. § 1491(a)(1).

[103] *Heyer Products*, 140 F.Supp. at 412-13. *See* CIBINIC, *supra* note 55, at 1536; Day, *supra* note 98, at 326; Hopkins, *supra* note 55, at 423.

[104] *Heyer Products*, 140 F.Supp. at 412-13; *see K-W Construction, Inc., v. United States*, 671 F.2d 481, 483-84 (1982); *Diamond v. United States*, 657 F.2d 1194, 1196 (1981); *Morgan Business Indutries, Inc. v. United States*, 619 F.2d 892, 894 (1980); *see also United States v. John Grimberg, Co., Inc.*, 702 F.2d 1362 (Fed. Cir. 1983).

[105] *Heyer Products*, 140 F.Supp. at 412-13. The court's implied in fact bid protest jurisdiction was re-affirmed in *Keco Industries, Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974).

[106] *Heyer Products*, 140 F.Supp. at 412-13.

[107] *United States v. King*, 395 U.S. 1, 3-5 (1969); *Glidden Co., v. Zdanok*, 370 U.S. 530, 557 (1962); *United States v. Jones*, 131 U.S. 1, 2-3 (1889); *Quinault Allottee Association & Individual Allotees v. United States*, 453 F.2d 1272, 1275 n.1 (Ct. Cl. 1972).

[108] *King*, 395 U.S. at 3-5; *Glidden*, 370 U.S. at 557; *Jones*, 131 U.S. at 2-3; *Quinault*, 453 F.2d at 1275 n.1.

proposal preparation costs.[109]

### 2. The Federal Courts Improvement Act

In 1982, Congress attempted to remedy the COFC's lack of equitable powers through the passage of the Federal Courts Improvement Act (FCIA).[110] The Federal Courts Improvement Act provided that in order

> To afford complete relief on any contract claim brought before the contract is awarded, the [COFC] shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.[111]

But that provision's ambiguous language created as many problems as it solved.[112]

Confusion first arose over whether FCIA gave the COFC power to grant equitable

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[109] *Holt v. United States*, 1980 WL 20813 (Ct. Cl. 1980); *Keco Industries, Inc., v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970); *Heyer Products*, 140 F. Sup at 414.

[110] Federal Courts Improvement Act (FCIA) § 133, Pub. L. No. 97-164; 96 Stat. 25 (1982); S. Rep. No. 97-275, § 133 (1981) ("Section 133 gives the new claims court the power to grant declaratory judgments and give equitable relief in controversies within its jurisdiction. This provision will for the first time give the court specializing in certain claims against the federal government the ability to grant litigants complete relief. The committee concluded that this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government").

[111] FCIA § 133, Pub. L. No. 97-164; 96 Stat. 25, 39-40.

[112] Claybrook, *supra* note 14, at 7; Day, *supra* note 98, at 327; C. Stanley Dees & David A. Churchill, *Government Contract Disputes and Remedies: Corrective Legislation Is Required*, 14 PUB. CONT. L.J. 201 (1984); Hopkins, *supra* note 55, at 424; John S. Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests*, 16 PUB. CONT. L.J. 47 (1986); Jeffrey M. Villet, *Equitable Jurisdiction in Government Contract "Bid Protest" Cases: Discerning the Boundaries of Equity*, 17 PUB. CONT. L.J. 152 (1987).

relief after the award of a contract.[113] In *United States v. John Grimberg, Co.*, the Federal Circuit seized on FCIA's "before the contract is awarded" language to halve the COFC's potential equitable jurisdiction.[114] After reviewing the statute's legislative history,[115] the Federal Circuit held that the COFC's equitable power was limited to pre-award lawsuits.[116]

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[113] *United States v. John Grimberg, Co., Inc.*, 702 F.2d 1362 (Fed. Cir. 1983). *See generally* Hopkins, *supra* note 55, at 424 (discussing commentators' concerns that the COFC may limit its equitable jurisdiction to pre-award lawsuits based on FCIA's "claim brought before the contract is awarded" language).

[114] *Grimberg*, 702 F.2d at 1374. Contemporary commentators had championed an alternate rationale, arguing that the "before a the contract is award" "merely confine[d] the equitable powers of the court so conferred to the disposition of challenges to the validity of contract awards as distinguished from suits for specific relief incident to contract performance or breach by the government." Hopkins, supra note 55, at 424-25 (citing R. Ackerly, G. Coburn and R. Fulton, *Government Contract Highlights*, (November, 1982).

[115] S. Rep. No. 97-275, § 133 (1981) ("[S]ection 133 gives the new claims court the power to grant declaratory judgments and give equitable relief in contract actions prior to award. Since the funds which the government utilizes to purchase goods and services are derived solely from public sources, the public possesses a strong interest in the ability of the government to fulfill its requirements in these areas at the lowest possible cost. Accordingly, in the vast majority of circumstances, the government must be permitted to exercise its right to conduct business with those suppliers it selects and to do so in an expeditious manner. The courts ordinarily refrain from interference with the procurement process by declining to enjoin the government from awarding a contract to a contractor which the government has selected.").

[116] *Grimberg*, 702 F.2d at 1374. Although some plaintiffs argued that contract award terminated the COFC's jurisdiction, the Federal Circuit held that as long as the suit was *filed* before award, the COFC retained jurisdiction. *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1481 (Fed. Cir. 1983); *Dean Forwarding Co., Inc. v. United States*, 2 Cl. Ct. 559, 564 (1983). Regardless of when the suit was filed, the COFC still retained its power to grant bid and proposal costs both before and after award. *Kinetic Structures*, 2 Cl. Ct. 343 (1983) (Plaintiff filed a post-award bid protest. Court dismissed the plaintiff's claim for post-award equitable relief, but heard the case on the merits based on claim for pre-award and post-award bid and proposal costs).

By limited the COFC's equitable powers to pre-award protests, the Federal Circuit arguably "achieve[d] an insignificant and absurd result" based on Congress' fears that post-award injunctions would wreck havoc in the orderly administration of government contracts.[117] First, if Congress was so opposed to post-award "judicial meddling," why leave the district courts post-award injunctive powers intact?[118] There was no evidence to suggest that post-award action by the COFC would be more harmful than that enacted by the district court.[119] All *Grimberg's* strict construction accomplished was to send contractors in search of post-award "intermeddling" to the district courts.[120]

The Federal Court's Improvement Act also called into question the district court's pre-award protest jurisdiction.[121] The Federal Courts Improvement Act provided that in "any contract claim brought *before the contract is awarded*, the [COFC] shall have *exclusive jurisdiction*."[122] Although the legislative history clearly indicated that Congress

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[117] *Grimberg*, 702 F.2d at 1378-9 (concurring opinion). *See generally* Claybrook *supra* note 14, at 8 (*Grimberg* "improperly" limited equitable relief to pre-award claims).

[118] *Grimberg*, 702 F.2d at 1378-9 (concurring opinion).

[119] *Grimberg*, 702 F.2d at 1378-9 (concurring opinion). *See generally* Hopkins, *supra* note 55, at 424-25 (discussing contemporary commentators' arguments for post-award equitable powers because Congress intended to confer *Scanwell* jurisdiction on the COFC and *Scanwell* jurisdiction included both pre-award and post-award post award protests).

[120] *Grimberg*, 702 F.2d at 1378-9 (concurring opinion). (Judge Nichols also said in his concurring opinion, "the bidder who for some inscrutable reason wants to litigate his bid protest only in the [COFC] need only file his suit without waiting to know if he has anything to protest. He may end up having sued to enjoin an award to himself.")

[121] *Id.*; Claybrook, *supra* note 14, at 8-9; Day, *supra* note 98, at 333; Hopkins, *supra* note 55, at 427; Kannan, *supra* note 55, at 427. The Justice Department, in a memo dated October 1, 1982, found that FCIA had divested the district courts of their pre-award bid protest jurisdiction. Hopkins, *supra* note 55, at 428.

[122] FCIA § 133, Pub. L. No. 97-164; 96 Stat. 25, 39-40.

intended for the district courts' ability to grant relief in pre-award bid protests to remain undisturbed,[123] the courts split on the issue.[124]

The Court of Federal Claim's judges also split over how broadly to construe the terms of the implied contract to fully and fairly consider each bid.[125] Some judges adopted a narrow view that the court's implied in fact contract jurisdiction "embrace[d] neither claims challenging the terms, conditions, or requirements of solicitations, nor the

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[123] S. REP. NO. 97-255 § 133 (1982) ("By conferring jurisdiction on the COFC to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of substantive law in this area. Specifically, the Scanwell doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left in tact *sic*."); H.R. REP. NO. 97-312, at 43 (1981) ("It is not the intent of the Committee to change existing caselaw *sic* as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action").

[124] For courts holding that they no longer had pre-award bid protest jurisdiction, *see Price v. United States Gen. Servs. Admin.*, 894 F.2d 323, 324 (9th Cir. 1990); *Rex Sys., Inc. v. Holiday*, 814 F.2d 994, 997-98 (4th Cir. 1987); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 721 n.4 (2d Cir. 1983); *Commercial Energies, Inc. v. Cheney*, 737 F. Supp. 78, 79-80 (D. Colo. 1990); *Metric Sys. Corp. v. United States Dep't of Air Force*, 673 F. Supp. 439, 440-41 (N.D. Fla. 1987); *Caddell Constr. Co. v. Lehman*, 599 F. Supp. 1542, 1546 (S.D. Ga. 1985); *Opal Mfg. Co. v. UMC Indus. Inc.*, 553 F. Supp. 131, 133 (D.D.C. 1982). For courts finding the district courts had concurrent jurisdiction with the COFC over pre-award bid protests *see Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057-58 (1st Cir. 1987); *Coco Bros. v. Pierce*, 741 F.2d 675, 678-79 (3d Cir. 1984); *Diebold v. United States*, 947 F.2d 787, 805-06 (6th Cir. 1991); *North Shore Strapping Co. v. United States*, 788 F. Supp. 344, 345-47 (N.D. Ohio 1992). *See also Grimberg*, 702 F.2d at 1362.

[125] Hopkins, *supra* note 55, at 434; Day, *supra* note 98, at 333.

policies and activities which preceded and resulted in the solicitation."[126] Those were breaches of statutory and regulatory obligations, not breaches of arising from an implied contract.[127]

Two judges took a different approach.[128] In *Electro-Methods, Inc., v. United States*, Judge Harkins summarily held that the implied in fact contract "includes a requirement that there be compliance with procurement regulations applicable to that solicitation, and recognition of applicable constitutional and statutory criteria."[129] Judge

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[126] *Eagle Construction Corp.*, 4 Cl. Ct. 470, 479 (1984); *Hero, Inc. v. United States*; 3 Cl. Ct. 413 (1983); (court lacked jurisdiction over claim "defects in the IFB make the bidding procedure unfair"); *Downtown Copy Center v. United States*, 3 Cl. Ct. 80 (1983) (court lacked jurisdiction claim agency failed "to include prevailing Department of Labor wage rate determinations in the Invitation For Bids (IFB), to eliminate certain ambiguities in the bid specifications, to correct inaccurate estimates for telephone directories and search hours, and to rectify the consequences of disclosing plaintiff's wage rates"); *Cecile Industries, Inc., v. United States*, 2. Cl. Ct. 690 (1983)(court lacked jurisdiction over claim that procurement regulation was unconstitutional); *Ingersoll-Rand Co., v. United States*, 2 Cl. Ct. 373 (1983) (court lacked jurisdiction over claim that solicitation drafters favored a specific contractor and, therefore, structured the solicitation to the benefit of that contractor); *Quality Furniture Rentals, Inc., v. United States*, 1 Cl. Ct. 140 (1983) (court has no jurisdiction over claim that a solicitation was not in accordance with applicable statutes and regulations or claim that an agency lacked authority to contract).

[127] *Eagle Construction*, 4 Cl. Ct. at 479; *Hero*; 3 Cl. Ct. at 417; *Copy Center*, 3 Cl. Ct. at 82; *Cecile Industries*, 2. Cl. Ct. at 694; *Ingersoll-Rand*, 2 Cl. Ct. at 376.

[128] *Electro-Methods, Inc., v. United States*, 3 Cl. Ct. 500 (1983) (finding a suspension notice which invalidated bids on unawarded contracts unconstitutional because it violated due process); *Planning Research Corp., v. United States*, 4 Cl. Ct. 283 (1983) (court had jurisdiction to over claims that agency failed to comply with procurement statute or regulation).

[129] *Electro-Methods*, 3 Cl. Ct. at 508. The Federal Circuit affirmed the grant of standing, although the language the court created confusion as to why. *Electro-Methods, Inc., v. United States,* 728 F.2d 1471, 1475 (Fed. Cir. 1984) (*Electro-Methods II).* The court limited its holding to the facts of the case and found that using an illegal suspension notice to disregard bid submitted before the suspension notice was a failure to treat those bids fairly as mandated by the implied in fact contract they created. *Electro-Methods II,* 728 F.2d at 1475.

Seto reached the same conclusion a different way.[130] He acknowledged there was a disagreement over jurisdictional boundaries, but suggested a recent Federal Circuit case, *CACI, Inc.--Federal v. United States*, may have resolved the tension.[131] In *CACI*, the Federal Circuit stated that "the essence of 'the *Scanwell* doctrine,' which Congress intended [FCIA] to make applicable to the Claims Court, is that an unsuccessful bidder has standing to challenge a proposed contract award on the ground that in awarding the contract the government violated statutory and procedural requirements."[132] Judge Seto agreed and assumed jurisdiction over an agency's failure to follow a procurement regulation.[133]

These three areas highlight the possibly unintended, but disruptive consequences of FCIA. Consequently, legal scholars swiftly recommended Congress revise the bid

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[130] *Planning Research*, 4 Cl. Ct. at 291.

[131] *Id.*

[132] *CACI, Inc.--Federal v. United States* 719 F.2d 1567, 1574 (Fed. Cir. 1983). Judge Seto illuminated the Federal Circuits analysis explaining, "the first step is that "[t]he legislative history of [FCIA] shows that Congress intended the Claims Court to have the same authority over suits by unsuccessful bidders ... that the district courts had under *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C.Cir.1970). The second step consists of the statement that '[t]he essence of 'the Scanwell doctrine, '... is that an unsuccessful bidder has standing to challenge a proposed contract award on the ground that in awarding the contract the government violated statutory and procedural requirements.' The court therefore concludes that '[t]o deny ... standing to litigate this question before the Claims Court would vitiate the jurisdiction Congress gave that court over such suits in the Federal Courts Improvements Act.'" *Planning Research*, 4 Cl. Ct. at 291 (citations deleted).

[133] *Planning Research*, 4 Cl. Ct. at 291. Notwithstanding the *CACI* decision and *Planning Research*, the narrow approach retained vitality. *See Eagle Construction Corp.*, 4 Cl. Ct. 470 (1984).

protest system by legislating concurrent and equal jurisdiction for the district courts and the Court of Federal Claims.[134]

## III. STANDING UNDER ADMINISTRATIVE DISPUTES RESOLUTION ACT

In 1996, the confusion over who had jurisdiction over which bid protest and what remedy spawned the Administrative Disputes Resolution Act of 1996 (ADRA).[135] Finding that there was no "national uniformity in resolving" bid protests, Congress acted to eliminate the forum shopping permitted by the resultant "disparate bodies of law."[136] Congress therefore pooled standing, remedy granting powers, and review into one statutory provision that applied to both the federal district courts and the COFC.[137]

The new statute at 28 U.S.C. § 1491(b)(1), first established concurrent bid protest standing.[138] The statute provided that

> both the Unites *sic* States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgement on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute and regulation in connection with a procurement and proposed procurement."[139]

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[134] Hopkins, *supra* note 55, at 447.

[135] Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 28 U.S.C. § 1491(b) (1996); *see* 142 Cong. Rec. S11848-01 (1996); H.R. Conf. Rep. 104-841 (1996); *see also* Kannan, *supra* note 55, at 416-17; Michael F. Mason, *Bid Protests and the U.S. District Courts--Why Congress Should Not Allow the Sun to Set on this Effective Relationship*, 26 PUB. CONT. L.J. 567, 586 (1997).

[136] 142 Cong. Rec. S11848-01 (1996). *See* H.R. Conf. Rep. 104-841 (1996).

[137] 28 U.S.C. §1491(b).

[138] 28 U.S.C. §1491(b)(1).

[139] *Id.* The question was raised as to whether the COFC's retained itsimplied in fact jurisdiction under 28 U.S.C. § 1491(a). In response, the COFC stated that the ADRA standing has "superceded" and "obviated the need for" implied in fact jurisdiction. *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 120 (2002).

Thus, Congress gave standing to "interested parties."[140]

Next, 28 U.S.C. 1491(b)(2) set the courts' remedy granting powers. This provision gave both the district courts and the COFC the ability to "award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[141] Consequently, whether the COFC could provide equitable relief was no longer based on the date of contract award.

Finally, 28 U.S.C. 1491(b)(4) supplied the bid protest standard of review.[142] For review, Congress affirmatively adopted the standards set forth in section 706 of the APA.[143] Section 706 of the APA provides,

> To the extent necessary to decision and when presented, the review court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . .
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;

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[140] *Id.*

[141] 28 U.S.C. § 1491(b)(2).

[142] 28 U.S.C. § 1491(b)(4).

[143] *Id.*

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 [of Title 5] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[144]

The Administrative Dispute Resolution Act also served one additional function. As a part of the implementing legislation, Congress included a sunset provision on federal district court jurisdiction.[145] Unless Congress otherwise provided, the district courts lost their bid protest jurisdiction on January 1, 2001.[146] January 1, 2001 passed without action by Congress. Consequently, the Court of Federal Claims now has exclusive jurisdiction over bid protests.[147]

But the ADRA also created a dilemma -- exactly who was an "interested party?" That question divided the Court of Federal Claims.[148] Some judges espoused the Competition in Contract Act's (CICA) definition.[149] The Competition in Contracting Act governs the bid protest jurisdiction of the General Accounting Office (GAO) and defines

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[144] 5 U.S.C. § 706.

[145] Pub. L. No. 104-320, § 12, 10 Stat. 3870, 3874 (1996) (previously codified at 28 U.S.C. § 1491(d)).

[146] *Id.*

[147] *Id. See Emery Worldwide Airline, Inc., v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001);*City of Albuquerque V. United States Department of Interior*, 217 F. Supp. 2d 1194 (D.N.M. 2002); *Novell v. United* States, (109 F. Supp. 2d 22 (D.D.C. 2000). For an arguments that the district courts may still have jurisdiction to hear bid protests *see* Peter Verchinski, *Are District Courts Still a Viable Forum for Bid Protests?*, 32 PUB. CONT. L.J. 393 (2003); ABA *Comment*, supra note 55.

[148] *Xtra Lease, Inc., v. United States*, 50 Fed. Cl. 612, 617 (2001) (detailing the COFC's split on the definition of interested party).

[149] *CC Distributors*, 38 Fed. Cl. at 778; *see also Xtra Lease*, 50 Fed. Cl. at 617.

interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award the contract."[150]

Other COFC judges envisioned a less rigid test.[151] They found that "interested party" under the ADRA embraced a broader spectrum of protestor than under CICA.[152] Within this flexible group, some judges turned to the APA for guidance.[153]

The COFC's lack of unity prompted the Federal Circuit to establish a definitive "interested party" standard. In 2001, the Federal Circuit resolved the "interested party" predicament by adopting the more narrow CICA definition.[154]

### A. *American Federation of Government Employees, AFL-CIO, v. United States*

Ironically, the Federal Circuit began its journey towards the functional equivalent of APA standing in a decision that explicitly rejected it.[155] In *American Federation of*

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[150] 31 U.S.C. § 3551(2).

[151] *Cybertech*, 48 Fed. Cl. at 643; *AFGE*, 46 Fed. Cl. at 592-93; *Phoenix Air Group*, 46 Fed. Cl. at 101-103; *CCL, Inc.*, 39 Fed. Cl. at 789-90; *Delbert Wheeler*, 39 Fed. Cl. at 245; *ATA Defense Industries*, 38 Fed. Cl. at 494-95; s*ee also Xtra Lease*, 50 Fed. Cl. at 612, 617 (2001).

[152] *Phoenix Air Group*, 46 Fed. Cl. at 101-103; *CCL, Inc.*, 39 Fed. Cl. at 789-90; *Delbert Wheeler*, 39 Fed. Cl. at, 245; *ATA Defense Industries*, 38 Fed. Cl. at 494-95; s*ee also Xtra Lease*, 50 Fed. Cl. at 612, 617 (2001).

[153] *Cybertech*, 48 Fed. Cl. at 643; *AFGE*, 46 Fed. Cl. at 592-93; s*ee also Xtra Lease*, 50 Fed. Cl. at 617.

[154] *American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294 (2001) ("Two potentially displaced federal employees and their unions brought suit challenging a government determination that it was more economical to contract out the operation of three depots currently run by federal government employees").

[155] *American Federation*, 258 F.3d. at 1299.

*Government Employees, AFL-CIO, v. United States,* the Federal Circuit acknowledged a choice of solutions to the "interested party" dilemma, including the test for standing under the APA.[156] The protestor advocated the adoption of the "ordinary dictionary definition" of interested party or, in the alternative, the APA test for standing.[157] Conversely, the government championed the CICA definition.[158] Ultimately, the Federal Circuit found the CICA argument more persuasive and defined interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award the contract."[159]

The Federal Circuit first examined the plain statutory language of 28 U.S.C. § 1491(b) and found it unhelpful.[160] The court then turned to the statute's legislative history and determined that Congress intended only to confer "*Scanwell* jurisdiction."[161] Unfortunately, "*Scanwell* jurisdiction" could be interpreted two ways. On one hand,

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[156] *Id.*

[157] *American Federation*, 258 F.3d. at 1299. The lower court had adopted the APA test for standing. *American Federal of Government Employees, AFL-CIO, v. United States*, 46 Fed.Cl. 586, 595 (2000) (*AFL-CIO*).

[158] *American Federation*, 258 F.3d. at 1299.

[159] *Id.*, at 1302.

[160] *American Federation*, 258 F.3d. at 1299. The Federal Circuit noted that the statute failed to define interested party. *Id*

[161] *American Federation*, 258 F.3d at 1300. The court quoted Senator Levin, the ADRA's sponsor, who explained "each court would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system." *Id.* (citing 142 Cong. Rec. S11849). Thus the new statute gave the "COFC the same jurisdiction previously exercised by the district courts under *Scanwell*." *Id.*

"*Scanwell* jurisdiction" could be limited to disappointed bidders.[162] On the other, "*Scanwell* jurisdiction" could encompass standing under Section 702 of the APA.[163] Which one was correct?

In its search for an answer, the court found little to support adopting APA standing.[164] The first point in CICA's favor was that the legislative history "suggested" Congress meant to limit standing to only disappointed bidders.[165] Further detracting from the APA argument was that while the ADRA explicitly invoked the APA standard of review under 5 U.S.C. § 706, it lacked any reference to APA standing under 5 U.S.C. §

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[162] *American Federation*, 258 F.3d at 1301. First, the "vast majority" of *Scanwell* suit involved disappointed bidders, as did the facts of the *Scanwell* case itself. *Id.* Second, the D.C. Circuit "characterized Scanwell as holding 'that a disappointed bidder on a government contract was a person aggrieved under the APA.'" Id. (citing *Free Air Corp v. FCC*, 130 F.3d 447, 450 (D.C. Cir. 1997); *International Engineering Co., v. Richardson*, 512 F.2d 573, 579 (D.C. Cir. 1975). Third, the Federal Circuit also had narrowly read *Scanwell*. *Id.* (citing *Southfork Systems, Inc. v. United States*, 141 F.3d 112 (Fed. Cir. 1998) ("the essence of the Scanwell doctrine . . . is that an unsuccessful bidder has standing to challenge a propsed contract award . . . .")).

[163] *American Federation*, 258 F.3d at 1301 (*Scanwell* granted standing based on the APA and the open language of Section 702 of the APA could support plaintiffs other than actual or prospective bidders). The lower court adopted this approach. *American Federal of Government Employees, AFL-CIO, v. United States*, 46 Fed.Cl. 586, 595 (2000) (*AFL-CIO*).

[164] *American Federation*, 258 F.3d at 1302. The lower court disagreed. *AFL-CIO*, 46 Fed.Cl. at 595 (2000). Congress granted the COFC's "jurisdiction over the full range of bid protest cases subject to review" in the district court. *Id.*, at 594 (citing Cong. Rec. § 11849). The full range of bid protests in the district courts was not limited to suits by actual or prospective bidder. *Id.*, at 595. Standing in the district courts was based on the APA. Thus, Congress intended for standing under the ADRA to mirror standing under the APA. *Id.*

[165] *American Federation*, 258 F.3d at 1302. The Court relied on a statement in the legislative history by Senator Cohen describing *Scanwell* as permitting "a contractor to challenge a Federal contract award." *Id.* (citing Cong. Rec. § 11848).

702.[166] Likewise, Congress could have used "aggrieved party" consistent 5 U.S.C. § 702, but it chose instead "interested party."[167]

The final nail in the APA's coffin was the perceived linkage between the ADRA and CICA. Both used "interested party" to create standing and while the ADRA did not explicitly provide a definition of interested party, CICA did.[168] Since both the ADRA and CICA specifically related to government procurements, Congress' deliberate use of the term "interested party" in the ADRA could only mean Congress intended to adopt CICA's "interested party" definition.[169] Consequently, the court held that an "interested party" under the ADRA was limited to an actual or prospective bidder.[170]

### B. *Myers Investigative and Security Services, Inc. v. United States*

The following year, the Federal Circuit revisited interested party standing in *Myers Investigative and Security Service, Inc., v. United States*.[171] Before the *American Federation* decision, the Federal Circuit had required a showing of prejudice in order to

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[166] *American Federation*, 258 F.3d at 1302.

[167] *Id.*

[168] *Id.* The Competition in Contracting Act used "interested party" to indicate who had standing to bring a bid protest at the GAO. 31 U.S.C. § 3551(2).

[169] *American Federation*, 258 F.3d at 1302.

[170] *Id.* Based on the CICA definition, the Federal Cicruit found that government employees and unions affected by competitive sourcing had no standing to sue. *Id.* The lower court declined to limit itself to the CICA definition, but found the displaced employees and union lacked standing because they failed the APA's "zone of interests" test. *AFL-CIO*, 46 Fed. Cl. at 597.

[171] *Myers Investigative and Security Service v. United States*, 275 F.3d 1366 (Fed. Cir. 2002) (protestor challenged the sole-source awards of two security contracts).

prevail in a bid protest.[172] To establish prejudice the protestor had to prove that but for the agency's illegal action, it had a substantial chance of winning the award.[173] After *American Federation*, the question arose as to whether this "substantial chance" rule continued to apply.[174]

The Federal Circuit found that it did.[175] In its discussion of the applicability of the substantial chance rule, the Federal Circuit equated prejudice to injury.[176] Since "prejudice (injury) is a necessary element of standing," a protestor must establish the requisite prejudice/injury via the substantial chance rule.[177]

With that understated reference to injury, could the Federal Circuit be thinking in APA terms? Interestingly enough, two sentences prior the "prejudice (injury)" statement, the court cited to page 561 of the seminal APA standing case of *Lujan v. Defenders of*

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[172] *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001); *Alfa Laval Separation, Inc., v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999); *Statistica, Inc., v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

[173] *Impresa*, 238 F.3d at 1332-33; *Alfa Laval*, 175 F.3d at 1367; *Statistica,* 102 F.3d at 1581.

[174] *Myers*, 275 F.3d at 1369-70. Hereinafter, prejudice and the "substantial chance" rule will be used interchangeably.

[175] *Myers*, 275 F.3d at 1369-70.

[176] *Id.*

[177] *Id.*

*Wildlife*.[178] Page 561 of *Lujan* marks the middle of the Supreme Court's discussion of the three elements of constitutional standing: injury, causation, and redressability.[179]

Moreover, in the previous paragraph, the court cited to two other APA standing cases, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* and *Steel Company v. Citizens for a Better Environment*.[180] The *Friends of the Earth* cite was to page 180, which while discussing mootness, also lays out the three elements of constitutional standing.[181] The *Steel Company* cite was to pages 102-104, which is an in-depth discussion of the components of Article III standing and nothing else.[182] The Supreme Court's statement that standing is a "threshold jurisdictional statement" came at the beginning of page 102.[183] The Federal Circuit had all the precedent it needed. Why then did the court include pages 103 and 104?

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[178] *Myers*, 275 F.3d at 1369 ("the party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The exact language of *Lujan* is "the party invoking federal jurisdiction bears the burden of establishing *these elements*." *Lujan*, 504 U.S. at 561 (emphasis added). "These elements" refers to the three elements of constitutional standing or the "irreducible constitutional minimum of standing." *Id. at 560-61.*

[179] *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

[180] *Myers*, 275 F.3d at 1369 (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 (2000) ("therefore, we may decide the issue of standing without reaching the mootness issue"); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998) ("like mootness, standing is a threshold jurisdictional issue").

[181] *Friends of the Earth*, 528 U.S. at 180.

[182] *Steel Company*, 523 U.S. at 102-04.

[183] *Id.*, at 102.

Perhaps the court has decided to align bid protest standing with that of constitutional standing and broached the issue with injury.[184] Perhaps it is simply something less innocuous. Whatever the reason, in the background plays the subtle leitmotif of the APA.

### C. *Information Technology & Applications Corporation v. United States*

Although *Myers* unambiguously incorporated prejudice into standing,[185] confusion developed as to whether it was an element of standing or an element of review.[186] In *Information Technology & Applications Corporation v. United States,* the Federal Circuit reiterated that prejudice was an element of standing, not review.[187] Judge Dyke confirmed his stance in *Myers* that "because the question of prejudice goes directly to the question of standing, the prejudice issue must be reached before addressing the

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[184] The author of *Myers*, Judge Timothy B. Dyk was a Law Clerk to Chief Justice Warren from 1962-63. The Warren Court is noted for its liberal approach to standing. *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 369 U.S. 83 (1968); Abram Chayes, *Public Law Litigation & The Burger Court*, 96 HARV. L. REV. 4, 10-11 (1982); Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises Inc.*, 91 HARV. L. REV. 1373, 1378 (1978); Leonard; supra note 32, at 19; Scott, supra note 37, at 660-61.

[185] *Myers*, 275 F.3d at 1369-70.

[186] *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003); s*ee All Seasons Construction v. United States*, 55 Fed. Cl. 175, 178 (2003); *United Payors & United Provider Health Services, Inc. v. United States*, 55 Fed. Cl 323, 329 (2002); *Information Technology & Applications Corporation v. United States*, 51 Fed. Cl. 430, 346-7 (2001) (*Information Technology II*).

[187] *Information Technology*, 316 F.3d at 1319. The lower court included prejudice and the substantial chance rule in review. *Information Technology II*, 51 Fed. Cl. at 346-7.

merits. As we said in *Myers*, 'prejudice (or injury) is a necessary element of standing.'"[188]

After solidly establishing prejudice as a necessary element of standing, the court took the opportunity to further clarify the "substantial chance" rule.[189]

> To establish prejudice, [the protestor] must show that there was a "substantial chance" it would have received the contract award but for the alleged error in the procurement process. . . . In other words, the protestor's chance of securing award must not have been insubstantial. . . . There is no question here that [the protestor] was a qualified bidder and that its proposal would have been improved and its chances of securing the contract increased [but for the error]. . . . Under these circumstances, [the protestor] has established prejudice (and therefore standing), because it had greater than an insubstantial chance of securing the contract if successful on the merits of the bid protest.[190]

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[188] *Information Technology*, 316 F.3d at 1319. Judge Dyk was also the author of the *Myers* decision. *Myers*, 275 F.3d 1366 (Fed. Cir. 2002).

[189] *Information Technology*, 316 F.3d at 1319. In *Information Technology II*, the COFC never actually reached the question of prejudice. The court found that the United States Air Force Space Command acted in a rational manner and, thus there was no error. *Information Technology II*, 51 Fed. Cl. at 347-57.

[190] *Information Technology*, 316 F.3d at 1319. The Federal Circuit addressed only one issue on standing and review, that of allegedly illegal discussions. *Id.*, at 1319-24. The Air Force sent different evaluation notices, which contained requests for additional information, to all three of the bidders. *Id.*, at 1316. The plaintiff alleged that three of the five evaluation notices sent to the awardee concerning past performance of subcontractors constituted discussions. *Id.* The plaintiff argued that had the Air Force conducted discussion with all bidders as required, the Air Force would have disclosed the significant deficiencies in the plaintiff's cost estimate. *Id.*, at 1316-17. The Air Force had decided not to run a "Most Probably Cost Estimate" on the plaintiffs proposal because the "proposed hours were so minimal and unrealistic that it was infeasible to perform an adequate analysis." *Id.* Had it been informed of the Air Force's assessment, the plaintiff would have cured the deficiencies. *Id.*, at 1317. Since "Cost/Price" was one area in which the awardee scored higher than the plaintiff, the plaintiff's inability to cure its cost element was a "significant factor" in its failure to win the award. *Id.* The Air Force characterized the evaluation notices as clarifications, an argument with which both the Court of Federal Claims and the Federal Circuit agreed. *Id.*, at 1324.

The protestor now need only show that a lack of error would increase the possibility of award and given it a greater than insubstantial chance of award.[191] As a result, the substantial chance rule has become a less insurmountable hurdle.[192]

### D. Substantial Chance and the GAO[193]

Besides a progression towards consistency with APA courts, another positive ramification of including prejudice in standing is that it makes it more difficult for courts avoid examining alleged violations of procurement statutes. It is much more problematic

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[191] *Information Technology*, 316 F.3d at 1319. In its analysis of whether the plaintiff had standing, the Federal Circuit assumed that the alleged error was true. *Id.* Consequently, the court began with the proposition that the evaluations notices were discussions and, if the Air Force had held discussion with all bidders as required, the plaintiff would have cured the deficiencies in its cost estimate. *Id.* It then weighed whether discussions would have increased the plaintiff's chances of awards. *Id.* Since the Air Force found that all the proposals met the "minimum contract requirements" and "all proposals were fundamentally sound," curing the cost estimate deficiencies would have increased the plaintiff's chance of award so that it had a "greater than insubstantial chance" at the contract. *Id.* However, the plaintiff lost on the merits. The Federal Circuit found the evaluation notices were clarifications. *Id.*, at 1324. Judge Hewitt of the COFC is the first to employ *Information Technology's* "greater than insubstantial chance" language. *ABF Freight System, Inc. v. United States,* 55 Fed. Cl. 392, 399 (2003) ("a protestor may establish prejudice by showing "that its chances of winning the award 'was greater than . . . insubstantial'").

[192] But it still remains a hurdle. The Federal Circuit in *H.G. Properties A, L.P., v. United States*, found the plaintiff lacked standing based on the COFC's finding that "no amount of negotiating could have made the plaintiff competitive for award." *H.G. Properties A, L.P., v. United States*, 2003 WL 21421629, 3 (Fed. Cir. 2003) (unpublished opinion not citable as precedent). Moreover, there was no evidence on the record that the plaintiff could have bettered its proposal. *Id.* Thus, the lack of error would not have increased the plaintiff's chance for award. *Id. But see* Judge Schall's dissent at *H.G. Properties*, 2003 WL 21421629 at 4.

[193] As stated above, the COFC's definition of "interested party" is based on the CICA, which establishes standing for the GAO. 35 U.S.C. § 3551. Thus, in order to have standing in either the GAO or the COFC's, one must be "means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 35 U.S.C. § 3551(2). The GAO also required that a protestor have a "substantial chance" at award but for the alleged error. *Dismas Charities, Inc.*, 2003 WL 21665202 (Comp.Gen. 2003).

for a court to rule that a plaintiff had an insubstantial chance of award, than it is rule that a plaintiff did not show it had a substantial chance of award, especially in the area of complex negotiated procurements.[194]

While the *Information Technology* test does not demarcate substantial and insubstantial as neatly as black and white, it will help the COFC avoid being labeled by commentators with the GAO as manipulating the element of prejudice to avoid decisions that are difficult or impolitic.[195] The GAO has not yet articulated what a "substantial chance" means with precision.[196] Even though the Federal Circuit did not reduce prejudice to a mathematical formula, it did provide concrete guidance upon which the

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[194] Of course it all comes down to how the court characterizes the error or lack thereof. In *Information Technology*, the Federal Circuit could have framed the lack of error not in terms of failure to hold discussions with all offerors, but instead as not sending evaluation notices. *Information Technology*, 316 F.3d at 1319. Had no evaluation notices been sent, the plaintiff's cost estimate hours would still have been deemed "so minimal and unrealistic that it was infeasible to perform an adequate analysis." *Id.*, at 1316-17. As result, the court could have easily held that the plaintiff had no substantial chance of gaining the contract award.

[195] Ralph C. Nash & John Cibinic, *Protests: The "No Prejudice" Rule*, 11 No. 5 Nash & Cibinic Rep. 20 (1997) (hereinafter Reporter). The GAO is also perceived as "responsive to political signals from Congress and President." Kovacic, *supra* note 80, at 489.

[196] *Dismas Charities, Inc.*, 2003 WL 21665202 (Comp.Gen. 2003) (protestor must have a "**substantial chance**" of award but for the alleged error); *Kolaka No .eau, Inc.*, 2003 CPD ¶ 67, 6 (Comp. Gen. 2003) (protestor must have a "**reasonable chance**" of award but for the alleged error); *C Construction Co.*, 2003 WL 1857970, *5 (Comp. Gen. 2003) (protestor must have a "**reasonable possibility**" of award but for the alleged error); *Anthem Alliance for Health, Inc.; TRICARE Management Activity-- Reconsideration*, 98-2 CPD ¶ 66, 6 (Comp. Gen. 1998) (protestor must have a "**reasonable likelihood**" of award but for the alleged error); Reporter, *supra* note 192.

COFC judges can base their determinations.[197]

An ill-defined substantial chance rule only serves to lend credence to the suspicions of manipulation.[198] Suspicions of manipulation render the GAO vulnerable to the criticism that it is failing its mission of "Accountability, Integrity, and Reliability."[199] If the GAO's articulation of prejudice is not well defined, predictability and reliability suffer. Attorneys then fail to reliably predict likely outcomes. Who but the GAO bears the frustration of the losing lawyers' unfruitful time and effort?

Perception is reality. If the GAO is perceived as using the "substantial chance" rule to avoid politically charged decisions, it will not be perceived as committed to agency accountability.[200] Nor will it be seen as cherishing integrity. The end result of these frustrations and negative perceptions--based in fact or not-- is loss of trust, something the GAO cannot afford.

## IV AN INTERESTED PARTY'S "SUBSTANTIAL CHANCE" AT APA STANDING

Intuitively, APA standing seems to be more expansive than the rigid test adopted by Federal Circuit.[201] Standing under the APA conjures up the sweeping language of

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[197] *Information Technology* has been cited by the COFC twice. *ABF Freight System, Inc. v. United States,* 55 Fed. Cl. 392, 399 (2003) ("a protestor may establish prejudice by showing "that its chances of winning the awrd 'was greater than . . . insubstantial'") ;*All Seasons Construction, Inc., v. United States*, 55 Fed. Cl. 175, 178 (2003) (prejudice is a "question of standing").

[198] Reporter, supra note 192, at 20. The GAO is also perceived as "responsive to political signals from Congress and President." Kovacic, *supra* note 80, at 489.

[199] Reporter, supra note 192, at 20; Kovacic, *supra* note 80, at 489; www.gao.gov.

[200] Reporter, supra note 192, at 20; Kovacic, *supra* note 80, at 489.

[201] Cantor, *supra* note 14; Claybrook, *supra* note 14; Gartner, *supra* note 14; Shestko, *supra* note 5.

*Scanwell*.[202] It evokes images of a multitude of private attorneys general filing citizen suits to ensure agencies adherence to both the statutory law and their own internal regulations.[203] But is that really the case?

Standing under the APA has changed markedly since the days of *Scanwell*.[204] It has become much more formal and structured.[205] In *Lujan v. Defenders of Wildlife*, the Supreme Court articulated the current two-prong test for APA standing.[206] The first prong is "the irreducible constitutional minimum of standing."[207] The second is known as the "zone of interests" test.[208]

Constitutional standing contains three interwoven elements. "First, the plaintiff must have suffered an 'injury in fact.'"[209] Accordingly, the plaintiff's injury must be "(a)

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[202] Cantor, *supra* note 14; Claybrook, *supra* note 14; Gartner, *supra* note 14; Shestko, *supra* note 5.

[203] Cantor, *supra* note 14; Claybrook, *supra* note 14; Gartner, *supra* note 14; Shestko, *supra* note 5.

[204] Sunstein, *supra* note 56, Part I.

[205] William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article II Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763 (1997); Sunstein, *supra* note 56, at184.

[206] *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

[207] *Lujan*, 504 U.S. at 560. "Generalizations about standing to sue are largely worthless as such. One generalization is however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to cases and controversies." *Association of Data Processing Service Organizations, Inc., v. Camp*, 397 U.S. 150, 151 (1970).

[208] *Lujan*, 504 U.S. at 562.

[209] *Id.* For a discussion of the history of injury in fact and an argument that Article III contains no such requirement, *see* Sunstein, *supra* note 56.

concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical."[210] This requires "a factual showing of perceptible harm."[211] Furthermore, to be particularized, the "injury must affect the plaintiff in a personal and individual way."[212]

The second element is causation.[213] "There must be a casual connection between the injury and the conduct [of which the plaintiff complain[s]."[214] "The injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.[215] Accordingly, the government or agency action must have actually caused the harm without the actions of a third party serving to break the causal link.[216]

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[210] *Lujan*, 504 U.S. at 560.

[211] *Id.*, 566.

[212] *Id.*, at 560, n.1.

[213] *Id.* The dicta *Lujan* footnotes seven and eight seemed to eliminate the need for concrete proof of causation and redressability in suits involving violations of a legislative created procedural rights. Buzbee, supra note 199, at 803. Because "procedural rights" are special, once a plaintiff establishes injury in fact, he does not need to "meet all the normal standards" for causation and redressability. *Lujan*, 504 U.S. at 572, FN7, FN8. The violation and actual or potential injury are enough to provide standing "despite uncertain proof of causality or redressability in the sense of guaranteed or likely avoidance of the underlying threatened injury to a real interest." Buzbee, supra note 199, at 803. However, *Bennett v. Spear* declined to adopt *Lujan's* less strict "procedural rights" approach. *Id.* at 804. Instead, the Supreme Court subjected causation and redressability to "far greater scrutiny" than warranted under footnotes seven and eight, which focused on the need for "virtually determinative impacts." *Id.*

[214] *Lujan,* 504 U.S. at 560-61.

[215] *Id.* (alterations in the original).

[216] *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Finally, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision."[217] "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."[218] Consequently, relief is not the same as lack of illegal action.[219] Relief must actually solve the injury alleged.[220]

If plaintiff proves injury in fact, causation, and redressability,[221] he must next pass the "zone of interests" test before securing standing to sue. The "zone of interests" test requires that the plaintiff's injury "fall within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[222] To determine whether a plaintiff's injury falls within the statute's "zone

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[217] *Lujan,* 504 U.S. at 560-61.

[218] *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998).

[219] *Bennett v. Spear*, 520 U.S. at 170 ; s*ee* Buzbee, *supra* note 199, at 809; s*ee also Advanced Management Technology, Inc., v. Federal Aviation Administration*, 211 F.3d 633, 638 (D.C. Cir. 2000) (Federal contractor does not have standing based on the "right to a legally valid procurement process"); *Look v. United States*, 113 F.3d 1129 (9th Cir. 1997) (federal procurement regulations do not create a broad "right to a legally valid procurement process").

[220] *Bennett v. Spear*, 520 U.S. at 170; s*ee* Buzbee, *supra* note 199, at 809.

[221] The level of proof required depends on the stage of the judicial proceeding. "Each element of Article III standing must be supported in the same way as any other manner on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Bennett v. Spear*, 520 U.S. at 167-68.

[222] *Bennett v. Spear*, 520 U.S. at 176; *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 487 (1998)

of interests," the court looks not to the "overall purpose of the Act in question, but . . . to the particular provision of law" allegedly violated.[223]

As stated in the introduction, the purpose of this paper is not to prove with 100% certainty that all outcomes under interested party standing would be the exactly same as under the two-prong test for APA standing. Instead, the goal is to provide a conceptual framework for evaluating interested party standing within the context of the APA. That framework will illustrate that the Federal Circuit unerringly adopted a standard that embodied all the elements of APA standing. In essence, the court effectively distilled APA standing into a test readily understandable to the people it most affected, the government contractor. Moreover, it eliminated a case-by-case approach to standing that would have harmed the efficiency of the government's procurement system.

| **Interested Party As APA Standing** | | |
|---|---|---|
| | **APA Standing** | **Interested Party Standing** |
| **Constitutional** | - Injury in Fact<br>- Causation<br>- Redressability | - Direct Economic Interest<br>- Prejudice & Substantial Chance Rule |
| **Prudential** | "Zone of Interests" Test | An interested party is limited to an actual or prospective bidder. (CICA definition of interested party.) |

[223] *Bennett v. Spear*, 520 U.S. at 176; *First National Bank*, 522 U.S. at 492.

### A. CICA and the "Zone of Interests" Test

This framework equates the Federal Circuit's adoption of CICA's interested party definition with a district court's application of the "zone of interests" test. Remember, the CICA definition limits "interested parties" to "actual or prospective bidder[s] or offeror[s] whose direct economic interest would be affected by the award of a contract or by failure to award the contract." Procurement statutes generally exist to level the playing field among actual or prospective bidders.[224] They tell agencies how to plan acquisitions, structure solicitations, evaluate proposals, and make awards.[225] Thus, the interests protected by the procurement statutes are unique to actual or prospective bidders or a specific class of bidders, for example minority or small business contractors.

Although the Supreme Court has not been consistent in its approach to determining who falls within a statutory provision's "zone of interests," lower courts

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[224] CIBINIC, *supra* note 55; Scott J. Kaplan, *Trustworthiness in Public Contracting: Back to Boss Tweed? CF&I Steel v. Bay Area Rapid Transit District*, 31 PUB. CONT. L.J. 237, 238-40 (2002).

[225] CIBINIC, *supra* note 55, at 1; Kaplan, *supra* note 225, at 238-40.

continue to inquiry as to "whether Congress intended to benefit the plaintiffs."[226] While Congress clearly intended for procurement statutes to benefit the government and contractors, it is difficult to see what other plaintiffs procurement statutes would protect.[227] Accordingly, a district and appellate courts could easily find that only an actual or prospective bidder falls within a procurement statute's "zone of interests." In

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[226] *Ethyl Corporation V. Environmental Protection Agency*, 306 F.3d 1144, 1148 (D.C. Cir. 2002); *Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002); *Courtney v. Smith*, 297 F.3d 455, 458 (6th Cir. 2002); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 870-71 (9th Cir. 2002); Jonathan R. Siegel, Zone of Interests 27 (unpublished draft manuscript on file with author) (final manuscript to be published in the Georgetown Law Journal) (Jun. 2003). The Supreme Court has not consistently interpreted the zone of interests test. *Id.* One area of uncertainty is whether there must be evidence of Congressional intent for the statute to protect the interest in question. Siegel, *supra* note 220, at 17-24. In *Federal Election Commission v. Akins* and *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, the Supreme Court relied on Congressional intent when deciding whether a plaintiff fell with a statutory provision's "zone of interest." *Federal Election Commission v. Akins*, 524 U.S. 11, 20 (1998); *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 524-26 (1991); *see* Siegel, *supra* note 220, at 17-24. In *National Credit Union Administration v. First National Bank & Trust Co.*, the Supreme Court stated, "in applying the 'zone of interests' tests, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interest 'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interested affected by the agency action in question are among them." *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *see* Siegel, *supra* note 220, at 17-24. .

[227] For cases stating that procurement statutes are for the benefit of the government and bidders, *see BK Instruments, Inc., v. United States*, 715 F.2d 713, 720 (2nd Cir. 1983) (citing *Merriam v. Kunzig*, 715 F.2d 1233, 1242 (3rd Cir. 1973)); *American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310, 1313 (9th Cir. 1977) ("by virtue of the various bidding and procurement statutes, the government invites bidders to respond and, accordingly, not only is the government's interest protected, but also the interests of those who respond to the government's invitation"); *Hayes Intern. Corp. v. McLucas*, 509 F.2d 247, 251 (5th Cir. 1975); *Merriam v. Kunzig*, 715 F.2d 1233, 1242 (3rd Cir. 1973) (procurement statutes protect "not only the Government's interest in securing advantageous contracts, but also the interests of those responding to the Government's invitation to do business with it").

fact, the appellate courts have expressed hesitancy to extend procurement statutes "zone of interests" beyond disappointed bidders.

Limiting interested parties to actual or prospective bidders also arguably effectuates constitutional standing. Injury in fact requires a plaintiff to prove a concrete and particularized injury.[228] Within the realm of bid protests, that proof logically requires some connection to the solicitation or award, i.e. someone who would be affected, i.e. an actual or prospective bidder. Ninety-nine percent of those affected by an agency's solicitation or contract are actual or prospective bidders. For someone more remotely connected to a solicitation or award of a contract, establishing a particularized and concrete injury is essentially impossible. Likewise, the more tangential the injury, the less likely the requirements causation and redressability will be met. Thus, the Court of Appeals for the Federal Circuit's application of the "actual or prospective bidder" most clearly is an expression of the "zone of interests" test, but could also convey the constitutional need for an injury in fact, causation, and redressability.

### B. Substantial Chance Meets Constitutional Standing

Even though an actual or prospective bidder meets the "zone of interests" test, that does not guarantee him APA standing. He must still satisfy the requirements of constitutional standing. In the bid protest arena, the substantial chance rule is the Federal Circuit's articulation of the constitutional standing. It consolidates the three constitutional elements of injury in fact, causation, and redressability into one inquiry:

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[228] *Bennett v. Spear*, 520 U.S. 154, 179 (1997); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

would the lack of error increase the plaintiff's possibility of award, thus giving it a greater than insubstantial chance at the contract.[229]

Although this rule embodies all three elements of constitutional standing, it most clearly expresses the elements of injury in fact and redressability.[230] Injury in fact which requires a plaintiff to prove a concrete and particularized injury.[231] If the error did not affect the plaintiff's chances of award, there was no injury. The plaintiff is the same position with or without the error. Moreover, if the plaintiff has a less than insubstantial chance of award, it is "speculative" as opposed to "likely" than the court can redress it injury.[232] Redressability requires that the lack of error would make it "likely" the plaintiff would be awarded the contract.[233] Seen through the filter of these constitutional standing requirements, the Federal Circuit's interpretation of "substantial chance" rule is the functional equivalent of prong one of APA standing.

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[229] *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003).

[230] The Court of Appeals for the Federal Circuit has explicitly equated the substantial chance rule with the element of injury. *See Myers Investigative and Security Services, Inc. v. United States*, 275 F.3d 1366, 1369-70 (2002); *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312, 1319 (2003).

[231] *Bennett v. Spear*, 520 U.S. at 176; *Lujan,* 504 U.S. at 560-61.

[232] *Bennett v. Spear*, 520 U.S. at 170.

[233] *Id.*

### 1. Sealed Bid Procurements

In sealed bid procurements, the lowest responsible bidder wins the contract. It is an all or nothing game. The contracting office does not have the discretion to choose a contractor other than the lowest responsible bidder.[234]

Application of the substantial chance rule in the sealed bid procurements mandates that in order to establish standing, a protestor must be able to show that but for the error they would have been the lowest bidder.[235] The substantial chance rule requires a greater than insubstantial chance of award.[236] In sealed bidding, the only contractor with a greater than insubstantial chance of award is the lowest bidder because the contracting officer must award solely based on price.[237] Thus, proof that a lack of error would move a contractor from its place as the fiftieth lowest bidder into the second lowest bidder position would not meet the substantial chance rule.[238] The contractor, even as the second lowest bidder, still has zero chance--no substantial chance--of gaining the contract award. The plaintiff must show that the lack of error would displace all lower bidders ranked above it for award.[239]

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[234] CIBINIC, *supra* note 55, at 505-506.

[235] *Xtra Lease, Inc., v. United States*, 50 Fed. Cl. 612, 618 (2001); Vulcan Engineering, 16 Cl. Ct. 84, 88 (1988), s*ee also Myers*, 275 F.3d at 1369-70.

[236] *Information Technology*, 316 F.3d at 1319.

[237] CIBINIC, *supra* note 55, at 505-506. The agency "shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price related factors included in the solicitation." 10 U.S.C. § 2305(b)(3); 41 U.S.C. § 253(b).

[238] *Xtra Lease*, 50 Fed. Cl. at 618.

[239] *Id.*

The same would be true under constitutional standing. First, the protestor must establish injury in fact. The agency's action must harm the contractor. If the agency could not award the contract to the complaining contractor even absent the error, then the error caused no harm to the contractor.[240] The harm is not actual or imminent.[241] The plaintiff is in the same position--not the contract awardee--with or without the lack of error. Thus, to show injury based on a sealed bid, the contractor must show the error deprived it of the contract.

Assuming for the sake of argument that the protestor can establish injury, causation and redressability are still lacking. Causation requires that the challenged action must have caused the harm, e.g. the loss of the contract. Unless the contractor can show that rectifying the error would render it the lowest bidder, the loss of the contract resulted from the submission of a lower bid.[242] Thus, the agency action did not "cause" the harm.

Redressability requires that the relief sought will relieve the harm, not merely fix the procedural violation.[243] Thus, in a bid protest, relief should, give the protestor a

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[240] See *Look v. United States*, 113 F.3d 1129,1132 (9th Cir. 1997); *Energy Transportation Group v. Maritime Administration*, 956 F.2d 1206, 1211 (D.C. Cir. 1992).

[241] *Lujan,* 504 U.S. at 560.

[242] See *Look v. United States*, 113 F.3d 1129,1132 (9th Cir. 1997; *Energy Transportation Group v. Maritime Administration*, 956 F.2d 1206, 1211 (D.C. Cir. 1992).

[243] *Bennett v. Spear*, 520 U.S. at 170-71. *See* Buzbee, *supra* note 199, at 809. For example, in *Bennett v. Spear*, the ranchers and irrigation districts alleged that a certain Biological Opinion violated provisions of the Endangered Species Act. *Bennett v. Spear*, 520 U.S. 154 (1997). They established injury in fact by showing that the adoption of that Biological Opinion would cause a reduction in the water available for irrigation due to water level restrictions. *Id.* In its discussion of redressability, the Supreme Court stated that in order to prove redressability, the plaintiffs had to show that the agency would :not

"likely" chance of award.[244] The contracting officer's mandate to award based on price makes sealed bidding essentially an all or nothing proposition.[245] Accordingly, if the lack of alleged error would not transform the protestor into the lowest bidder, the protestor does not have a "likely" chance of award.[246] Unless alleviating the challenged action would gain the sealed bid protestor the contract, the court cannot redress the injury.

Both the Ninth Circuit[247] and the D.C. Circuit[248] Court of Appeals concur with this paper's analysis of constitutional standing as applied to disappointed bidders. In the Ninth Circuit case of *Look v. United States*, the solicitation stated that the contract would be awarded to the lowest priced, technically acceptable bidder.[249] All the bidders were rated technically acceptable.[250] The contract was awarded in two parts, Block A and Block B.[251] The protestor was the fourth lowest bidder on Block A and the fifth lowest

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impose such water level restrictions--if the Biological Opinion [wa]s set aside." *Id.* at 171.

[244] *Bennett v. Spear*, 520 U.S. at 170; *see* Buzbee, *supra* note 99, at 809.

[245] CIBINIC, *supra* note 55, at 505-506

[246] Bid and proposal costs are an alternative to equitable remedies. But they serve to relieve the same harm - decreased chance of "likely" award. Thus, the same resdressability analysis applies.

[247] *Look v. United States,* 113 F.3d 1129 (1997).

[248] *Energy Transportation Group v. Maritime Administration*, 956 F.2d 1206 (D.C. Cir. 1992).

[249] *Look,* 113 F.3d at 1130. Although this case actually involved a negotiated procurement, the solicitations requirement to award to the lowest priced, technically acceptable contractor makes it analogous to a sealed bid award determination since all bidders were rated technically acceptable.

[250] *Look,* 113 F.3d at 1130.

[251] *Id.*

bidder on Block B.[252] The lowest bidder for both Block A and Block B was the same company, Datalect, a British firm.[253]

The protestor alleged that the award to a foreign firm was illegal due to security requirements.[254] The only foreign firm who bid was Datalect.[255] Therefore, correcting the illegality removed only Datalect from the procurement.[256] On Block A, the protestor became the third lowest bidder and on Block B, the protestor became the fourth lowest bidder.[257] The court found that since removal of the error would not make the protestor the bidder with the lowest price, the protestor failed to establish the injury in fact and causation necessary under the constitutional prong of APA standing.[258]

In reaching its conclusion, the Ninth Circuit adopted the D.C. Circuit's rationale articulated in *Energy Transportation Group v. Maritime Administration*.[259] In *Energy Transportation*, the D.C. Circuit held that Article III standing mandates that a disappointed bidder "demonstrate only that if its bid had been fairly and honestly

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[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Look,* 113 F.3d at 1130.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Look*, 113 F.3d at 1131-32; s*ee Energy Transportation Group v. Maritime Administration*, 956 F.2d 1206, 1211 (D.C. Cir. 1992).

considered, there was a substantial chance that [it] would receive an award."[260] The D.C. Circuit clarified a substantial chance rule's interrelation with Article III standing by stating,

> While we have characterized the disappointed bidder's injury as being to its 'right to a legally valid procurement process,' that characterization does not relieve the plaintiff of the need to show a causal link between its loss and the agency's illegal conduct. There could be no real injury--certainly no injury 'fairly traceable' to the allegedly illegal act--unless the plaintiff would have some chance of prevailing in a bidding free of the alleged illegalities.[261]

Thus, as *Energy Transportation* demonstrated, the substantial rule is simply another way to characterize the APA standing elements of injury in fact and causation.[262]

### 2. Negotiated Procurements

Unlike sealed bidding, agencies generally do not award negotiated contracts based solely on one criterion.[263] The solicitation criteria and evaluation factors are usually more complex.[264] Due to that complexity, the contracting officer has considerably more discretion and flexibility in determining which contract constitutes the best value for the

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[260] *Energy Transportation,* 956 F.2d at 1211; s*ee Look*, 113 F.3d at 1131.

[261] *Energy Transportation,* 956 F.2d at 1211; s*ee Look*, 113 F.3d at 1131-2. The "causal link" and 'fairly traceable" language, while not cited specifically to *Lujan v. Defenders of Wildlife*, could almost be direct quotes. *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 560 (1992) (there must be a "causal connection" and injury must be "fairly traceable" to the alleged error).

[262] *Energy Transportation,* 956 F.2d at 1211; *Look*, 113 F.3d at 1131-32.

[263] CIBINIC, *supra* note 55, at 710. However, some negotiated contracts stated that award will be based to the lowest priced, technically acceptable bidder. In that case, the sealed bid analysis of the substantial chance rule would apply. *See Look*, 113 F.3d at 1131-32. *See* also *Energy Transportation Group v. Maritime Administration*, 956 F.2d 1206, 1211 (D.C. Cir. 1992).

[264] CIBINIC, *supra* note 55, at 710.

government.[265] Unlike sealed bidding and its restriction to price, the unpredictability of what the contracting officer will decide during a best-value tradeoff, makes it impossible to be 100% certain of the award outcome but-for the error. Accordingly, under the substantial chance rule as applied to negotiated procurements, the protestor would only need to establish that it was a "qualified bidder and that its proposal would have been improved" thereby increasing its chances of award.[266]

The same is true under constitutional standing. By showing that the challenged conduct decreased its chance of award, the protestor has established injury in fact. Since the challenged conduct, if true, diminished the protestor's likelihood of award, that decreased competitive edge is more than "fairly traceable" to the alleged error, and causation falls into place.[267] Likewise, the court has the ability to grant appropriate relief. Setting aside the contract or delaying the contract's award will provide the protestor another chance at the award because it creates the opportunity for the contracting officer to re-make the best value decision with all of the correct information. Since the award

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[265] CIBINIC, *supra* note 55, at 710 ("Contracting by negotiation also enables the Government to use techniques which allow it to make tradeoffs between cost or price and other factors when selecting a proposal for award.") *See Maintenance Engineers v. United States*, 50 Fed. Cl. 399, 412-413 (2001).

[266] *Information Technology & Applications Corporation v. United States*, 316 F.3d 1312, 1319 (2003). The next sentence of the court's opinion described what made the protestor a "qualified bidder, the court stated, "the Air Force's decision letter stated that '[a]ll offerors provided proposals which met minimum contract requirements' and 'all proposals were fundamentally sound.'" *Id.* (alternations in original).

[267] *Lujan v. Defenders of Wildlife*, 540 U.S. 555, 560 (1992).

decision is not a forgone conclusion even if the protestor does not have the lowest price, it is "likely" not "speculative" the protestor may secure the award.[268]

### C. The Ties That Bind Interested Party and APA Standing

The following are thought models for exploring whether the most likely non-bidder plaintiffs would or would have standing under the APA and why. Interested party standing precludes each of the following plaintiffs from bring a bid protest. The thought models explore why the same outcome would be likely (as opposed to speculative) under the APA.

#### 1. Standing and the General Public

The Federal Circuit's definition of "interested party" does not allow members of the general public to sue for a statutory violation stemming from the issuance (or proposed issuance) of a solicitation or the award or failure to award a contract. Neither does APA standing. Article III's "cases" and controversies" rejects standing based the right of every citizen to "require that the Government be administered according to law and that the public moneys not be wasted."[269] Likewise, when a suit rests upon a "generalized grievance" where the "impact on [the] plaintiff is plainly undifferentiated and common to all members of the public," no standing exists.[270]

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[268] *Id.*; CIBINIC, *supra* note 55, at 710.

[269] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574(1992). *See Allen v. Wright*, 468 U.S. 737, PAGE (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court").

[270] *Lujan*, 504 U.S. at 574 (we have consistently held that a plaintiff raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy").

## 2. Standing and Competitive Sourcing

The substantial chance rule precludes suits by government employees (and their unions) opposing the competitive sourcing of federal employee jobs.[271] The federal circuits that have addressed this issue have held that government employees protesting the contracting out of their jobs under A-76[272] meet the "zone of interests" test.[273] Thus, the unavailability of standing in COFC's for government employees protesting competitive sourcing is consistent with the judicious application of APA standing by the appellate and district courts.[274]

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[271] *American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294 (Fed. Cir. 2001).

[272] A-76 refers to the Office of Management and Budget's Circular A-76, which regulates the competitive sourcing of federal government jobs.

[273] *Courtney v. Smith*, 297 F.3d 455, 462-467 (6th Cir. 2002); *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989); *National Association of Government Employees v. United States*, (D. Mass. 2003); *American Federation of Government Employees, AFL-CIO v. Babbitt*, 143 F. Supp. 2d 927, 931-32 (S.D. Ohio 2001); *American Federation of Government Employees, AFL-*CIO v. United States, 2001 WL 262897 (W.D.Tex. 2001); *American Federation of Government Employees AFL-CIO v. United States*, 46 Fed. Cl. 586 (2000) *see also* Charles Tiefer & Jennifer Farragut, *Letting Federal Unions Protest Improper Contracting-Out*, 10 Cornell J.L. & Pub. Pol'y 581 (2001).; Robert H. Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front-Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613 (2001). But see the earlier Sixth Circuit cases of *National Air Traffic Controllers Association v. Pena*, 1996 WL 102421 (6th Cir. 1996) (unpublished opinion); *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991) (found reviewability without discussing the "zone o interests" test).

[274] The GAO also denies standing to federal employees and their unions in competitive sourcing cases because they are not actual or prospective bidders. On June 11, 2003, the GAO published a notice soliciting comments regarding whether the Office of Management and Budget's (OMB) May 29, 2003, revisions to Circular A-76 affected the standing of federal employees and unions to file a bid protest. General Accounting Office, Bid Protest Regulations, Government Contracts, Notice, 68 FR 35411, June 13, 2003. The Circular A-76 revisions "make competitions involving in-house government competitors more similar to private/private competitions" than had previously "been the case." *Id.*

### 3. Standing Based on Environmental Injuries

Often procurements affect the surrounding area and its landowners, especially in construction contracts. For example, an Air Force base solicits bids for the construction of a runway that will increase the type and number of sorties flown, thereby increasing noise pollution and harming the surrounding landowners. Those landowners do not have standing to sue for errors in the procurement process in the COFC. The same would be true under APA standing.

First, the landowners harm results from the agency's decision to build the runway. Accordingly, the landowner should and can sue to stop the runway based on an error in the agency's decision-making process. The ADRA is no bar even if a solicitation has been proposed or issued. The district courts are well able to distinguish a suit grounded in the procurement and a suit that is really based on the agency's decision to procure an item.[275]

Moreover, if the landowner cannot challenge the decision to build the runway because the decision was in accordance with the applicable law, he should not be to back door his objections using a bid protest. The solicitation has not caused the landowners harm, the agency's underlying decision to procure the item has. Moreover, redressability is lacking. Fixing the error in the solicitation or contract award will not stop the runway from being constructed.

Other environmental statutes require the government to use recycled materials or give preference to low pollution products. Clearly, if the solicitation does not include these requirements, a manufacturer who could supply those products to the government

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[275] *Corel Corporation v. United States*, 165 F. Supp. 2d 12 (D.D.C. 2001).

has standing to protest. A member of an environmental group would not. That result is also consistent with APA standing.

How would the activist characterize his injury in fact and trace it back to the solicitation? Using recycled materials stops the depletion of natural resources?[276] His injury is not specific or individual, but is shared with the "public at large."[277] Higher polluting products will somehow cause him health problems?[278] First, how will the activist show these health problems are actual or imminent?[279] Second, how will the environmentalist "fairly trace" these actual or imminent health back to this one, single contract?[280] He cannot. An environmental activist's interests in a contract award are, thus, too remote to establish bid protest standing.

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[276] *See* Sunsteain, *supra* note 190, at 227-229.

[277] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1991); *see* Sunsteain, *supra* note 190, at 227-229.

[278] *See* Sunsteain, *supra* note 190, at 227-229.

[279] *Lujan*, 504 U.S. at 560; *see* Sunsteain, *supra* note 190, at 227-229. In *Lujan*, plaintiffs argued that the Secretary of the Interior's noncompliance with the Endangered Species Act robbed them of their ability to see certain endangered species in their natural habitat, thus creating injury in fact. *Lujan*, 504 U.S. at 563-566. The Supreme Court found that the plaintiffs failed to establish injury in fact because they could not show that they intended to visit the natural habitats "imminently." *Id.* A mere intention to sometime return to the species' habitat is not enough to establish injury in fact. *Id.* The Supreme Court stated it would have found injury in fact if the plaintiffs had a trip scheduled or plane tickets. *Id.*

[280] *Lujan*, 504 U.S. at 560; *see* Sunstein, *supra* note 56, at 227-229.

### 4. Standing of Contractor Employees and Subcontractors

Under the Federal Circuit's definition of interested party, neither a subcontractor nor an employee of a government contractor has standing to bring a bid protest.[281] The same result is highly plausible under APA standing. The author was unable to uncover a published bid protest suit in which contractor employees protested a contract award under the APA. Similarly, the author was unable to uncover a post-Lujan APA subcontractor bid protest except that discussed in special considerations.[282]

Prior to bid submission, neither the employee nor the subcontractor could establish the requisite injury in fact, causation, or redressability since the employee's company/prime contractor has not yet bid on the contract. The employees and subcontractor can only be affected if the company bids and fails to gain the award. If the company chooses not to bid, the solicitation is not the cause of harm--the company's decision not to bid breaks the causal link. Thus, no APA standing to sue.

But what if the solicitation is a set aside which excludes a prime contractor from consideration? The following application of APA standing would apply in those cases as well as when a prime contractor is denied the award of a contractor due to illegal agency action. Under either set of circumstances, meeting the APA standing requirements is not a simple proposition.

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[281] *American Federation of Government Employees, AFL-CIO, v. United States*, 258 F.3d 1294, 1302 (2001); 28 U.S.C. §1491(b)(1).

[282] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

### a. Injury In Fact

First, employees[283] and subcontractors must prove a concrete injury affecting them in a "personal and individual way."[284] Loss of a contract does not automatically translate into harm to an employee or subcontractor. The employee would have to show that the loss of the specific contract in question caused loss of earnings or the elimination of the employee's job. The subcontractor would have to show that the prime contractor had chosen it for work on the challenged contract. Assuming the employee and subcontractor could prove those specific economic harms, they could likely establish injury in fact.[285]

### b. Causation

Due to the injury in fact requirement, the class of potential employee plaintiffs has been significantly reduced. The causation element decreases it even more. To show causation, the employee must now link his lost earnings or lost job to the specific contract challenged.[286] Unless the protestor is the incumbent contractor, losing a contract does not generally decrease the need for employees or labor hours.

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[283] While a single employee is unlikely to have the finacial resources for a federla court bid protest, if the employee belongs to a union, the union may sue based on "associational standing." "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and niether the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Incorporated,v. United States*, 528 U.S. 167, 183 (2000).

[284] *Lujan v. Defenders of Wildlife,* 504 U.S. 555,560, FN1 (1992).

[285] *See Lujan,* 504 U.S. at 560. *See also ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489, 492 (1997); Superior Services, Inc. v Dalton, 851 F. Supp. 381 (S.D. Cal 1994)..

[286] *See Lujan,* 504 U.S. at 560.

Moreover, if the effect of losing one individual contract is so severe as to cause the employee's company to cut back hours and lay-off employees, the cause of the company's problems is not really the loss of the contract. The company has other, pre-existing problems that contributed to the employee's economic harm. Consequently, it becomes difficult for the employee to prove the job is, in fact, "fairly traceable" to the challenged conduct as opposed to the company's lack of viability.

While subcontractors do not face the previously discussed employee causation challenges, they, like employees, must still overcome the harsh reality that the prime contractor made a reasoned decision not to protest. While the 'fairly traceable' test does not limit standing to injury's for "which the [agency's] actions are the very last step in the chain of causation,"[287] the fact remains that the employer's/prime contractor's lack of protest is truly more directly responsible for the harm than the agency's actions. The company deliberately failed to take an available action that might have been able to save the employee's job and secure the subcontractor's employment. Consequently, the company's failure to protest may be, by itself, enough to break the "causal connection."[288]

### c. Redressability

The company's decision not to protest also adversely effects redressability. The employee is asking a court to accept as "'likely' as opposed to speculative'" that staying

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[287] *See Lujan,* 504 U.S. at 560.

[288] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). *Bennett v. Spear* introduced causation by a "determinative or coercive effect." *Bennett v. Spear*, 520 U.S. 154, 168 (1997). Where the agency's action produced injury by a "determinative or coercive effect upon the action of someone else" causation is established. *Id.* Thus, an employee or subcontractor *could* argue that the agency's action was so coercive it caused the prime contractor not to file a protest. *See also Bennett v. Spear*, 520 U.S. at 168.

or overturning this one award would cause the company to reinstate the employee with the same hours and/or wages.[289] The court would certainly explore the company's continued viability. Moreover, it would undoubtedly focus on the fact that the employee's company made a business decision not to initiate a protest.

That lack of protest also hinders the subcontractor's quest for standing because the court must ultimately accept that the prime contractor stands ready to accept and perform the contract in order to satisfy the element of redressability. Unfortunately, assumption that the prime contractor desires the contract award is directly contradicted by the company's choice not to pursue a protest on its own, which cuts against finding redressability. Similarly, the prime contractor's decision not to protest may be driven by financial, legal, or other business decisions unknown to the employee or subcontractor and into which the court may not desire to delve.[290]

In the end, the employee or subcontractor will have to prove the prime contractor would have "likely" been awarded the contract but for the alleged error.[291] Without that contract award, the employees cannot reclaim their jobs or decreased labor hours. Likewise, the subcontractor cannot gain its subcontract. Ironically, this "likely" requirement essentially dovetails back into the substantial chance rule.

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[289] *Bennett v. Spear*, 520 U.S. at 170. The Court of Federal Claims may also award bid and proposal costs. 28 U.S.C. 1491(b). However, the amount of bid and proposal costs would not be sufficient to save an employee's job.

[290] Rebecca E, Pearson, *The Air Force's Experience with the Expanded Bid Protest Jurisdiction in the Court of Federal Claims*; 34-Fall PROCLAW 3, 4 (1998).

[291] *Bennett v. Spear*, 520 U.S. 154, 170 (1997).

### d. Special Subcontractor Considerations

But what about when a procurement statute restricts who can be a subcontractor on a contract based on race or small business status? While there is no standing available at the COFC, APA standing is not necessarily precluded. If the plaintiff's alleges that the statute is unconstitutional or the regulation is illegal, the plaintiff would still have standing under the APA in the district courts. The ADRA covers objections to solicitations, awards, or violation of a statute or regulation in connection with a procurement.[292] It does not provide standing based on allegations that a procurement statute or regulation is illegal.[293] Consequently, the APA fills in the gap and would provide standing if the plaintiff meets both of its constitutional and prudential tests.[294]

### e. Other Considerations Relating to the Federal Circuit's Adoption of CICA's Definition of "Interested Party"

While some employees and subcontractors may demonstrate injury in fact, proving causation and redressability under APA standing precedent remains problematic. Admittedly, the possibility, however improbable, does exist that a district court under the

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[292] 28 U.S.C. 1491(b)(1).

[293] *Id.* A subcontractors inability to bid on a prime contract due to the illegal provision's inclusion in a solicitation serves to establish injury in fact, but does not form the basis of the suit. The plaintiff is not objecting to the solicitation, but to the statute or regulation. Moreover, in *Adarand Constructors, Inc., v. Pena*, the Supreme Court characterized a plaintiff's objection to race based set asides is "that a discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 211 (1995) (citing *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 667 (1993). A plaintiff can met the injury in fact requirement by alleging "that sometime in the relatively near future it will bid on a [prime] government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id.*

[294] 5 U.S.C. § 703; *Bennett v. Spear*, 520 U.S. at 175-76.

APA would rule in favor of employee or subcontractor bid protest standing. This section discusses alternative arguments supporting the exclusion of employees and subcontractors (and other similarly situated possible protestors) from the definition of "interested party."

First, by excluding employees and subcontractors from the definition of "interested party," the court avoids meddling in the business decisions of government contractors. The unsuccessful bidder's decision not to protest, in spite of valid legal grounds to do so, can be predicated on a wide variety of business, legal, or other reasons into which the courts, employees, and subcontractors have no insight.[295] An individual employee or subcontractor should not be allowed to use the courts to force a contractor into an unwanted contractual obligation.

Second, a narrow definition of "interested party" combined with the substantial chance rule limits abuses of the protest process.[296] Regardless of the chances of success, a subcontractor to or union representing employees of an incumbent contractor may initiate a protest solely in order to obtain a stay of contract award and extend prime contractor's business under the incumbent contract.[297] "Ensuring fairness for those contractors most directly affected by agency action is worth the risk that a prime contractor may abuse the protest process. The balance changes, however, as an entity's interest in the litigation becomes more remote."[298]

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[295] Pearson, *supra* note 141, at 4.

[296] Pearson, *supra* note 141, at 4.

[297] Pearson, *supra* note 141, at 4.

[298] Pearson, *supra* note 141, at 4. *See also* Kovacic, *supra* note 80, at 489. "[The] protest process may be prone to strategic misuse by private offerors who are seeking to

Finally, CICA's "interested party" definition, restricting protests to actual or prospective bidders, represents a reasonable a cost-benefit analysis. The relative harm in excluding a small number of potential yet tangential plaintiffs is outweighed by the harm those suits could cause to the procurement system.[299] The granting of bid protest access is a grant of the power to hold a procurement hostage for an indeterminate amount of time.[300] A case-by-case determination increases the number of possible hostages exponentially. The costs in money, time, productivity and personnel, and the effects of the delayed acquisitions outweighs the resultant restriction of court access.[301]

## PART V CONCLUSION

The Federal Circuit, whether it intended to or not, has adopted a test that embodies all of the elements of APA. By limiting standing to actual or prospective bidders, the Federal Circuit deconstructed the "zone of interests" into a constraint meaningful within the context of government procurement. Similarly, *Information Technology's* articulation of the "substantial chance" rule frames interested party in a manner than encompasses the fundamentals of injury in fact, causation, and

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impeded the ability of rival offerors to do business with the government. By filing a protest, an incumbent supplier may delay a contract award or compel the purchasing agency to repeat the competition. Here the protest can force a new (a perhaps thinly capitalized) entrant to spend substantial resources intervening to defeat the protest. [also incumbent continues to get contracts while protest] The strategic filing of protest actions can be an attractive exclusionary tool because, unlike a predatory pricing campaign, the predator can force the target of the strategy to bear costs that equal or exceed its investment in the predatory tactic." *Id.* Thus protests can be a huge barrier to entry.

[299] Pearson, *supra* note 141, at 4.

[300] Kovacic, *supra* note 80, at 489.

[301] *Id.*

redressability.[302] Thus, the Federal Circuit has transcribed the current APA law of standing into the language of government contracts.

Assuming the COFC applies the *Information Technology* test methodically and guided by principle that if a contractor is a qualified bidder and the lack of error increases its chances of award, the substantial chance test is met, the outcomes in the COFC will continue to mirror access to courts under the APA. But the COFC and the Federal Circuit still have the opportunity to back away from APA consistency. Prejudice's malleability can serve as a vehicle for tailoring outcomes and avoid uncomfortable decisions.[303] If the COFC and Federal Circuit desires to avoid being cast as ineffectual, they should continue to view standing through the lens of the APA.[304]

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[302] *Id.* By explicitly casting prejudice in the same mold as injury, the Federal Circuit has begun overtly analyzing bid protest suits in a manner consistent with the Supreme Court's application of the APA.

[303] Reporter 192, supra note .

[304] Reporter, supra note 192; Ralph C. Nash & John Cibinic, *Court Jurisdiction over Award Protests: A Difference of Opinion*, 14 No. 7 Nash & Cibinic Rep. 38 (July 2000).